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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ANTELOPE VALLEY HOSPITAL DISTRICT,
Petitioner,

v.

LANCASTER COMMUNITY HOSPITAL,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a hospital district, a political subdivision of the State of California, which in exercising specific authority delegated to it by state statute to operate a hospital, to prescribe the terms of admission to the hospital, and to establish rates paid by hospital patients, refuses to grant a discount for certain hospital services unless the payor utilizes other services, is prohibited from invoking the state action defense to the Sherman Antitrust Act on the ground that this allegedly anticompetitive conduct was not foreseeable from the exercise of its authority because:

1. The hospital district operates in a sector of the economy which the Court of Appeals found to be competitive;

2. The hospital district is authorized to provide services itself rather than to regulate the conduct of private entities; and

3. The hospital district is not a regulated utility or other "natural monopoly."

PARTIES TO THE PROCEEDING

The parties before the Court of Appeals were the following: Antelope Valley Hospital District, a political subdivision of California, and Lancaster Community Hospital, a privately held corporation. Antelope Valley Medical Group, Inc. also was before the Court of Appeals but is no longer a party and has no interest in the outcome of this petition. Petitioner, Antelope Valley Hospital District, has no parent company or non-wholly owned subsidiary.

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PETITION FOR A WRIT OF CERTIORARI

Antelope Valley Hospital District petitions the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in Docket No. 89-55167.

OPINION BELOW

The opinion of the Court of Appeals is reported at 940 F.2d 397 (9th Cir. 1991). It is set forth in the Appendix at 1a *et seq.*

JURISDICTION

The Court of Appeals rendered its judgment on July 15, 1991.[1] Petitioner filed a Petition for Rehearing and Sug-

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[1] The court previously had filed an opinion dated January 18, 1991, reaching the same result as the opinion of July 15, 1991. Petitioner filed a Petition for Rehearing and Suggestion for Re-

gestion for Rehearing En Banc of that judgment on July 29, 1991. The Petition for Rehearing was denied by order entered September 16, 1991, Appendix at 31a.[2] This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

1. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . .

2. Section 8 of the Sherman Act, 15 U.S.C. § 7, provides that:

> the word "person", or "persons", wherever used in . . . this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

3. Sections 32000, 32001, 32101, 32104, 32121, and 32125 of The Local Hospital District Law of California, Cal. Health & Safety Code, § 32000 *et seq.*, are set forth in the Appendix at 32a *et seq.*

STATEMENT OF THE CASE

Petitioner, Antelope Valley Hospital District, is a hospital district organized under The Local Hospital District Law of the State of California. It is a political subdivision of the State of California. The legislature delegates

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hearing En Banc of the opinion dated January 18, 1991. By order entered July 15, the Petition for Rehearing was denied, and the opinion dated January 18, 1991, was withdrawn and replaced by the opinion entered on July 15, from which review is sought.

[2] A second, identical order denying the Petition for Rehearing was entered on September 25, 1991.

authority to hospital districts and regulates their activities through The Local Hospital District Law. The boards of directors of hospital districts are elected by the electors of the districts. Antelope Valley Hospital District operates a general, acute care hospital in the City of Lancaster, in Los Angeles County, California.

Respondent, Lancaster Community Hospital, operates a private, for-profit acute care hospital in the City of Lancaster. It filed suit against Antelope Valley Hospital District in February 1987 alleging that the Hospital District had violated the Sherman Act, 15 U.S.C. § 1 and § 2, state antitrust law, and certain state common law rights. The complaint alleged that the Hospital District had a monopoly in perinatal hospital services (obstetrical and neonatal services) and unlawfully used that monopoly by refusing to enter into contracts with health maintenance organizations for discounts from its generally prevailing rates for perinatal services unless those organizations agreed to admit patients needing other services to the hospital.

On March 2, 1988, the District Court granted summary judgment for the Hospital District and dismissed the complaint. Its order is set forth in the Appendix at 20a *et seq.* As relevant here, the District Court ruled that in undertaking the actions complained of the Hospital District is immune from the Sherman Act under the state action doctrine enunciated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), and most recently applied to political subdivisions in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

Lancaster Community Hospital thereupon filed an amended complaint alleging that the Hospital District had violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* On December 20, 1988, the District Court granted the Hospital District's motion for summary judgment, dismissing the

amended complaint on the ground that a RICO action could not be brought against a governmental entity.

The District Court converted these two summary judgment orders to final judgments pursuant to Federal Rule of Civil Procedure 54(b), by orders entered January 27 and March 10, 1989. Respondent timely appealed both judgments to the United States Court of Appeals for the Ninth Circuit, by notices of appeal dated February 8 and March 23, 1989. The appeals were consolidated. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

The Court of Appeals held that the Hospital District is not entitled to assert the state action defense to the Sherman Act and reversed the judgment dismissing the federal antitrust action against the Hospital District.[3]

State Action Defense

Parker v. Brown holds that Congress did not intend the Sherman Act to restrain actions of the states and that the Act was intended to apply only to private agreements or combinations. The Court's decision was informed by principles of federalism and state sovereignty:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. Brown, 317 U.S. at 351.

In four subsequent cases this Court has dealt with the applicability of the *Parker* defense to political subdivisions of a state.

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[3] The Court of Appeals affirmed the judgment dismissing the RICO claims.

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), a plurality stated that the *Parker* defense applies to anticompetitive conduct engaged in by political subdivisions "pursuant to state policy to displace competition with regulation or monopoly public service," which depends upon a finding that "the State authorized or directed a given municipality to act as it did." 435 U.S. at 413-14.[4] "This does not mean," the plurality explained, "that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization." *Id.* at 415. Quoting and adopting the formulation of the Court of Appeals, the plurality stated that the legislature will be found to have authorized the anticompetitive activities if it is found, from the authority delegated "to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.* (citation omitted)

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), held that general home rule authority to enact ordinances did not indicate there was a clearly articulated and affirmatively expressed state policy of replacing competition with regulation in cable television. The city consequently could be sued on a claim that its ordinance prevented the plaintiff from expanding its cable television business in violation of the antitrust laws.

Town of Hallie v. City of Eau Claire, on the other hand, involved a political subdivision which had been granted authority, as *City of Lafayette* had enunciated, to act in a particular area, rather than merely the general home rule authority at issue in *Community Communications*. The Court unanimously held that a city authorized to

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[4] Four Justices dissented on the ground that the plurality's "exclusive focus on a legislative mandate" unjustifiably limited the defense and that such a standard was unacceptably vague. 435 U.S. at 426, 427 (Stewart, J., joined by White, Blackmun, and Rehnquist, JJ. dissenting).

provide sewage treatment services and to annex neighboring areas was protected by the state action exemption against claims that it monopolized sewage collection and transportation services by tying sewage treatment services to collection and transportation services. The Court noted that its cases had not fully considered "how clearly" a state policy must be articulated, *Town of Hallie*, 471 U.S. at 40. The Court explained that it is not necessary for the legislature to make an express statement that it "intends for the delegated action to have anticompetitive effects," 471 U.S. at 43, and that the city's authority to provide sewage services and to determine the areas to be served was sufficient, since "anticompetitive effects logically would result from this broad authority to regulate." *Id.* at 42. Consequently, it found that such conduct was foreseeable. The Court warned that requiring the legislature expressly to state that it intends the delegated authority to have anticompetitive effects would be undesirable

> because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny. (citation omitted)

471 U.S. at 44, n.7.

The Court distinguished the authority involved in *Community Communications*. The home rule amendment there

> allocated only the most general authority to municipalities to govern local affairs . . . . The Amendment simply did not address the regulation of cable television . . . . Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that will foreseeably result in anticompetitive effects.

471 U.S. at 43.

Most recently, this Court held that the state action immunity applies even when government officials conspire with private parties and act in a corrupt manner, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991).

Authority Delegated to Hospital Districts

The authority granted to hospital districts by the California legislature is like that of the city in *Town of Hallie*. The Hospital District is made responsible for operating hospitals "according to the best interests of the public health" and is authorized "to make and enforce all rules, regulations, and by-laws necessary for the administration, government, protection, and maintenance" of its hospitals. Cal. Health & Safety Code § 32125, Appendix at 36a. It is authorized *to "prescribe the terms upon which patients may be admitted" to the hospital; to set rates, and "to establish such rates as will permit the hospital to be operated upon a self-supporting basis."* *Id.* (emphasis added). It is authorized to exercise the right of eminent domain, *id.*, § 32121(d), Appendix at 33a, and to impose taxes. *Id.*, § 32121(r), Appendix at 35a; *id.* §§ 32200, 32202, 32240. It also is authorized "to do any and all other acts and things necessary to carry out" its enabling statute and to exercise all powers "necessarily implied." *Id.*, § 32121(k), Appendix at 34a; *id.*, § 32001, Appendix at 32a.

Alleged Anticompetitive Acts

Health maintenance organizations and other entities engaged in financing health care often seek to negotiate arrangements with hospitals to obtain discounted charges based on the volume of patients they admit to the hospital. The legislature specifically contemplated that hospital districts may choose to negotiate rate contracts.[5]

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[5] Cal. Gov't. Code § 6254(t) provides a limited exemption from the laws pertaining to disclosure of public records for records of a hospital district relating to contracts negotiated by them for alter-

The claim at issue relates to the manner in which the Hospital District negotiated rates with health maintenance organizations for care provided to their members. Respondent alleged that the Hospital District leveraged a monopoly in perinatal services in an attempt to obtain favorable terms for the admission of patients to other services. It alleged that the Hospital District refused to give a discount on perinatal services to health maintenance organizations unless they agreed to direct their members to the Hospital District for medical-surgical services.

Respondent did not allege that the Hospital District denied perinatal services to patients whose care was not covered by a contract.[6] Patients who belonged to health maintenance organizations with which the Hospital District did not have a contract received perinatal services at the hospital, and the health maintenance organizations paid standard, non-discounted charges for those services.

Motion for Summary Judgment

The Hospital District's motion for summary judgment contended that it was foreseeable from the specific state authority granted to it that the anticompetitive conduct claimed by Respondent could result from its exercise of that authority and hence, under the standard of this Court's cases, that there was a state policy to replace competition with regulation. Respondent opposed the motion on a variety of theories. After the hearing on the motion, Respondent filed a Supplemental Memorandum quoting findings from an unrelated proceeding before the Federal Trade Commission concerning competition in the

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nate rates pursuant to Cal. Ins. Code § 10133 or § 11512. These statutes authorize hospitals to negotiate with health maintenance organizations and health service plans for "alternate" rates.

[6] Nor, contrary to the stated assumptions of the Court of Appeals, Appendix at 7a, 8a, 13a, was Petitioner accused of excluding others from providing hospital services.

general hospital market. It subsequently filed a Second Supplemental Memorandum to place before the court statements crafted for the proceeding by several former members of the California legislature and executive branch that in their opinion the legislature, after a change in policy in 1982, intended the general health care market to be competitive.

Decision of the District Court

The District Court (W.M. Byrne, J.) rejected Respondent's invitation to conduct a broad inquiry into California's policy with respect to the general health care system and instead focused on the nature of the authority delegated to the Hospital District. The District Court determined that this authority was at least as broad as that from which *Town of Hallie* found a policy to replace competition with regulation. Appendix at 23a. It recognized the existence of competition among health care providers, but held that this was not persuasive evidence that the legislature "did not intend or could not foresee that hospital districts would engage in anticompetitive activities." Appendix at 25a.

Decision of the Court Below

Respondent appealed, arguing that the District Court erred in determining foreseeability from the Hospital District's enabling statute (The Local Hospital District Law) and that the proper question was whether the legislature intended the general health care sector of the economy to be competitive. Respondent contended that the foreseeability test enunciated by this Court in *Town of Hallie* is "unnecessary, indeed inappropriate" where the existence of a policy to promote competition "can be gleaned directly from state legislative enactments and regulatory pronouncements with respect to the health care delivery system" in general. Opening Brief of Respondent to the Court of Appeals at 13. Relying upon the statements of the former government officials it had submitted to the

District Court in its post-hearing Second Supplemental Memorandum, Respondent argued that, although California had had a regulatory policy toward health care, a "monumental shift" in policy in favor of competition occurred in 1982. *Id.* at 33, 14. It argued that in light of this asserted new policy in the general health care sector, the foreseeability test articulated by *Town of Hallie* was "unnecessary, and inappropriate, . . . because even 'foreseeable' conduct is not shielded by the state action doctrine in the face of a clearly articulated and affirmatively expressed policy to replace regulation with competition." *Id.* at 24.

The court below reversed the District Court. It imposed a novel, three-part limitation on the state action defense. First, it interpreted *Town of Hallie* to require an examination of the state's policy with respect to competition in the sector of the economy involved (the provision of hospital services). It found that California had committed itself to a competitive market in hospital services and consequently that the foreseeable result of "the statutory scheme" is that hospital districts will compete. Appendix at 10, n.9; 12a-13a.

In addition, it held that anticompetitive conduct is foreseeable from the exercise of delegated authority only when the legislation authorized the government entity to regulate private conduct. It denied immunity because the Hospital District had been authorized "merely" to provide hospital services, and had not been given power to regulate the hospital services market generally. Appendix at 11a-12a.

Finally, it based its decision on the ground that the Hospital District was not acting as a utility. It concluded that this was relevant to determining what is foreseeable from the exercise of delegated authority because utilities are "paradigmatic examples of natural monopolies" which are "usually intensively regulated.' Appendix at 9a-10a and n.8, n.9.

On the basis of these three new tests, the court below concluded that the Hospital District "did not act in accord with California policy when it engaged in [the alleged] anticompetitive conduct." Appendix at 14a. The court below thus made findings as to the intent of the California legislature on the basis of an analysis that the District Court, adhering to *Town of Hallie*, had not undertaken.

REASONS THE WRIT SHOULD BE GRANTED

Action by the Court is necessary to clarify and harmonize inconsistent standards among the courts of appeals, to determine the applicability of antitrust law to government, to avoid the chilling effect the decision will have on governmental entities in exercising their delegated authority, and to avoid expensive and wasteful litigation in the federal courts.

a. The decision of the court below disregards the standard enunciated by the Court in *City of Lafayette* and *Town of Hallie;* undertakes a free-form and wide-ranging inquiry that is contrary to those cases; and imposes improper limitations on the state action defense that are contrary to the Court's holdings and to the principles of federalism underlying the doctrine.

b. The decision of the court below conflicts with those of other courts of appeals, creating confusion as to the status of the law and divergent results on an important question of federal law in different regions of the country.

c. The decision below will impair and make more expensive the conduct of government. It will impair the administration of justice by spawning litigation throughout the country to determine the appropriate standard, and litigation in the Ninth Circuit to apply the amorphous tests newly developed by that court. It will embroil federal courts in unnecessary interpretation of state statutes and in controversies over whether and to

what extent areas of the economy are competitive. And it will intrude federal antitrust courts into reviewing actions taken by state political subdivisions to implement programs pursuant to state statute.

I. THE ALLEGED ANTICOMPETITIVE CONDUCT WAS FORESEEABLE FROM THE HOSPITAL DISTRICT'S DELEGATED AUTHORITY

The Hospital District is authorized to operate hospitals, to enforce all rules necessary for doing so, to prescribe the terms upon which patients are admitted, to establish rates (which must be at levels that permit it to be self-supporting), and to negotiate contracts for those rates with health maintenance organizations and other third party payors. This case arose out of the Hospital District's negotiation of contracts with health maintenance organizations over the rates for services. Respondent complained that the Hospital District would not grant those organizations discounts on its regular rates for perinatal services unless it received guarantees of admissions of their patients needing other services.

The authority to contract and to set rates necessarily implied that the Hospital District would contract with some third party payors but not all. It is foreseeable from this that the Hospital District would refuse to contract with some health maintenance organizations if the terms were not satisfactory to it—the anticompetitive act alleged. The Hospital District's express authority to determine the terms upon which patients are admitted, its authority to negotiate rate contracts, and the requirement that it be self-supporting made it foreseeable that it would attempt to use that authority to obtain favorable contractual terms for the benefit of the other patients in the community it served.[7] Just as *Town of Hallie* found

[7] The legislature has recognized the need for hospital districts to enhance their revenues in order to fulfill the responsibilities dele-

that tying sewage treatment services to collection and transportation was a foreseeable result of the city's authority to provide sewage services, the Hospital District's alleged tying of a discount for perinatal services to admissions for other services was a clearly foreseeable result of its authority to set rates for hospital services and to negotiate contracts for the terms on which patients are admitted.

The court below acknowledged that the Hospital District was authorized by The Local Hospital District Law to engage in the contract activities that are claimed to be anticompetitive. Appendix at 5a, n.4.[8] Nevertheless, the

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gated to them. In 1988 the legislature amended The Local Hospital District Law "to address the urgent financial and administrative burdens facing hospital districts." Cal. Assembly Bill No. 857, Chapter 1346 at 7 (1988). It also enacted a new chapter to that Law to assist district hospitals in generating revenues by increasing their flexibility in selling or leasing district property. It did so because,

> The legislature finds that hospital districts are faced with critical revenue shortages and a need for additional revenue sources to provide basic and essential public services.

Cal. Health & Safety Code, § 32160.

[8] Because the case came to the Court of Appeals on summary judgment, the Hospital District had not had an opportunity to demonstrate the reasons it took the actions of which Respondent had complained. The Hospital District would demonstrate that the Hospital District's alleged monopoly in perinatal services was the result of Respondent's affirmative decision not to enter that market, even though there was sufficient demand to support two perinatal programs, because Respondent could make more money from other hospital services. Respondent sought to have the Hospital District provide perinatal services to members of health maintenance organizations with which Respondent had contracts in order to avoid having to provide its own perinatal service while increasing its volume of the more profitable business from those organizations. The Hospital District, in fact, did provide perinatal services to such health maintenance organizations but would extend a discount on them only if the organization supported other hospital services. If the Hospital District could increase volume for non-perinatal services, it would generate revenues which would better enable it to

court found that it was not foreseeable that the Hospital District would take those actions because it determined foreseeability on the basis of three new and unprecedented tests. These are discussed in the next section of this Petition.

Unlike the court below, other courts of appeals have found that it is foreseeable from the grant of authority to act in an area that the governmental entity will take anticompetitive actions related to that activity. None of these decisions limits foreseeability on the basis of the tests developed by the court below.

Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310 (8th Cir.), *cert. denied*, 112 S. Ct. 430 (1991), held that a city which operated a cable television system in competition with a private system was immune from claims that it had a predatory intent to destroy its competitor and used its monopoly over utilities to leverage its entry into the cable television market.

> [A] sufficient state policy to displace competition exists here since the challenged anticompetitive restraint is a necessary and reasonable consequence of [the city's] statutorily authorized entry into the cable television business.

Paragould Cablevision, 930 F.2d at 1314.

The Tenth Circuit similarly has held that Denver's authority to operate Stapleton Airport and to regulate airport activities immunized the city against claims that it exercised its power in order to monopolize the airport parking market to the detriment of private, competing parking lot operators. The city and the private firms operated competing parking lots. The city imposed discriminatory terms on the shuttle buses operated by its competitors. The court found that this was a foreseeable result of its authority to operate an airport

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provide free care to indigents and lower the charges other patients otherwise would be required to pay, while also satisfying the requirement of The Local Hospital District Law that the hospital be self-supporting. See also n.7, *supra*.

and to determine the conditions of access to it. *Allright Colorado, Inc. v. City & County of Denver*, 937 F.2d 1502 (10th Cir.), *cert. denied*, 60 U.S.L.W. 3295 (U.S. Dec. 2, 1991).

Numerous other courts of appeals similarly have found anticompetitive conduct foreseeable from the exercise of comparable delegated authority.[9] One dealt specifically

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[9] *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987) (Massport's allocation of terminals among airlines in anticompetitive manner foreseeable from authority to fix terms for use of airport); *Cine 42nd Street Theater Corp. v. Nederlander Organization*, 790 F.2d 1032 (2d Cir. 1986) (restraint on competition in theater market foreseeable from authority of redevelopment agency to site cultural facilities); *Montauk-Caribbean Airways v. Hope*, 784 F.2d 91 (2d Cir.), *cert. denied*, 479 U.S. 872 (1986) (foreseeable that municipality authorized to enter into exclusive contracts would exercise that authority to deny operating rights at airport); *Hancock Industries v. Schaeffer*, 811 F.2d 225 (3d Cir. 1987) (logical result of authority to operate landfills was that authorities would close the landfills to out-of-county waste in violation of antitrust laws); *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir.), *cert. denied*, 474 U.S. 903 (1985) (authority to determine use of airport made it foreseeable that city would permit one company to operate airport taxicabs); *Woolen v. Surtran Taxicabs, Inc.*, 801 F.2d 159 (5th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987); *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir.), *cert. denied*, 488 U.S. 891 (1988) (foreseeable from villages' authority to combine resources for sewage treatment that they would deny developers' requests for sewage services in order to control the use of the developers' property); *LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) (local governments' authority to combine resources for sewage treatment and zoning made it foreseeable they would constrain competition among themselves and among developers); and *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 825 (11th Cir.), *cert. denied*, 110 S.Ct. 1960 (1990) (foreseeable that a hospital district which was authorized to conduct peer review would rely on recommendations by physicians and boycott a physician). *See also Monarch Entertainment Bureau, Inc. v. New Jersey Highway Authority*, 715 F. Supp. 1290 (D.N.J.), *aff'd*, 893 F.2d 1331 (3d Cir. 1989) (anticompetitive management contract entered into by New Jersey Highway Authority for concert hall foreseeable from its authority to operate the facility).

with a hospital. The Court of Appeals for the Fourth Circuit found that a county which was authorized to operate a hospital, to establish a fee schedule, and to determine which physicians may practice in it—authority which is the equivalent of Petitioner's authority to set rates, to negotiate contracts, and to determine the terms on which patients are admitted—was entitled to assert the state action defense against claims that its exclusive contract with physicians constituted an illegal tying arrangement. *Coastal Neuro-Psychiatric Associates v. Onslow Memorial Hospital*, 795 F.2d 340 (4th Cir. 1986).[10]

II. THE COURT BELOW IMPOSED LIMITATIONS ON THE DEFENSE THAT ARE WITHOUT PRECEDENT AND ERRONEOUS

The court below interposed three new tests for the determination of foreseeability and the application of the state action defense:

a. It relied mainly on the notion that the defense is available only if the legislature did not intend the sector of the economy in which the government agency is acting to be competitive.

b. It also held that the defense applies only if the government agency is regulating private conduct rather than providing services itself.

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[10] Several district courts also have recognized the defense for actions taken by hospitals operated by governmental agencies. *Cohn v. Wilkes General Hospital*, 767 F. Supp. 111 (W.D.N.C. 1991) (authority of municipal hospital to determine privileges for use of hospital made it foreseeable that it would act anticompetitively by denying privileges); *Central Florida Clinic for Rehabilitation, Inc. v. Citrus County Hospital Board*, 738 F. Supp. 459 (M.D. Fla.), *aff'd*, 888 F.2d 1396 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 2207 (1990) (immunity for a county hospital authorized to operate a hospital and to adopt all necessary rules, regulations, and bylaws for the operation of the hospital against claims that it leveraged monopoly power in one market to compete unfairly in another); *Hospital Development & Services Corp. v. North Broward Hospital District*, 619 F. Supp. 535 (S.D. Fla. 1985) (authority of district hospital to fix the terms of hospital use sufficient to confer immunity on charges that it limited its services anticompetitively).

c. Finally, it held that the defense depends on the agency's acting as a utility or other "paradigmatic natural monopol[y]."

These theories are irrelevant to the principles of federalism underlying the state action defense and to the delegation of state sovereignty that permits political subdivisions to invoke the defense. The court's decision is erroneous and unprecedented, and conflicts with the decisions of this Court and of other courts of appeals.

A. The Court Erred in Basing the State Action Defense on the Competitiveness of the Sector in Which the Governmental Agency Operates

Respondent argued to the Court of Appeals that the foreseeability test of *Town of Hallie* was "inappropriate" when the legislature intended the sector of the economy in which the government agency acted to be competitive. The court below essentially adopted that theory and held that conduct authorized by state statute would not be foreseeable if the sector of the economy in which the government agency is acting is meant to be competitive.

This test erroneously switches the analysis from the nature of the agency's delegated authority to a characterization of the general sector in which the agency is functioning. This is directly contrary to the decisions of this Court, which hold that immunity turns on whether the action of the political subdivision is foreseeable from the exercise of authority delegated to it and therefore is deemed to be the policy of the state.[11] The court's holding is without precedent.[12]

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[11] Denying the state action defense when the governmental entity operates in a competitive environment would negate the *Parker* doctrine. The antitrust laws are most likely to be invoked, and the defense thus to be relevant, where there is competition. See the cases cited in n.9, *supra*.

[12] The court (Appendix at 13a) found support from note 5 of *Town of Hallie* on the ground that the Court there "considered state

The court's test has no relevance to the principles of federalism underlying the state action doctrine or to the inquiry which determines whether applying the antitrust laws to a political subdivision of the state would impinge upon the state's sovereignty. Whether conduct of the political subdivision is foreseeable from the authority delegated to it does not depend on how the sector of the economy as a whole is structured.

Nor is there any basis in the policies behind the antitrust laws for making a governmental entity's immunity depend on the competitive structure of the sector in which it operates. The antitrust laws apply to regulated industries. As this Court has reminded, the fact that an industry is highly regulated "makes the play of competition not less important but more so." *United States v. Philadelphia National Bank*, 374 U.S. 321, 372 (1963). Despite the importance of the antitrust laws, Congress permitted the states to interfere with competition in highly regulated and unregulated sectors of the economy alike.

The standard enunciated by the court below not only is irrelevant to the state action defense, contrary to the decisions of this Court, and inconsistent with the principles of the doctrine, but also is unduly amorphous. It invites the federal antitrust courts into a chartless exploration of a broad range of state statutes. How is the federal court to determine what sector is meant to be competitive? What degree of competition is sufficient to deny the immunity?

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statutes." The two sections which the Court considered cursorily, in fact, dealt with the authority of municipalities and were referred to by the Court as the "enabling statute." They were not reflective of a general policy in the sector as a whole. Similarly, the two provisions referred to in note 8 of *Town of Hallie* were part of the statutory scheme stating the authority and obligations of the cities.

Respondent argued that the legislature intended the health care field to be regulatory until it changed its policy in 1982. The court "found" this change in policy from fragments of legislation. Appendix at 13a, n.12. First it cited legislation permitting third party payors to contract for inpatient hospital services. Cal. Welf. & Inst. Code § 14081. It is not clear why being granted the ability to contract—which is a right not uncommon in the commercial world, whether regulated or not—is indicative of a competitive sector. The court also noted that legislation was enacted in 1985 to permit groups to be organized to contract for health care services. Cal. Bus. & Prof. Code § 10133.6. This too does not seem to be a strong indicator of a legislative intent to establish a fully competitive sector. Indeed, contrary to the purposes for which the court relied on it, Section 10133.6 specifically *exempts* the formation of these groups of providers and purchasers from state antitrust laws (as a new product). *See also* Cal. Bus. & Prof. Code § 16770(g). Finally, the court relied on legislation to "do away with" requirements for health care providers to obtain certificates of need for hospital construction, Cal. Health & Safety Code § 439.7; but this provision did not go into effect until January 1, 1987, after the events giving rise to the complaint.[13]

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[13] The court below also cited two amendments to The Local Hospital District Law which, it said, "contemplate that the districts operate in a competitive environment." Appendix at 13a, n.12. Some hospital districts compete with private hospitals; others are the sole providers in their community. But the fact that the government agency competes with private firms does not suggest that it is not foreseeable that the agency will interfere with competition. *See Allright Colorado; Paragould Cablevision.* In fact, the defense is relevant, as discussed in n.11, *supra*, only where the agency is in competition and interferes with it. The District Court correctly found that these enactments did not signal a policy in favor of competition but were an effort by the legislature to assist the hospital districts: "More likely, the legislature determined that where competition did exist, even more authority was required to buttress

Thus, even the isolated statutory provisions which the court below selectively extracted and stitched together in its inappropriate effort to characterize the structure of the general health care sector are internally ambiguous. The court's analysis, moreover, was one-sided. It did not consider other aspects of the regulatory structure of the health care field that make it more intensively regulated than other sectors.

Hospitals, for instance, must meet licensing and other regulatory requirements of the state, including detailed regulation of administration, space, construction, services, and personnel qualifications.[14] A substantial amount of hospital reimbursement is determined by government-administered prices for Medicare beneficiaries, and utilization of hospital facilities by Medicare patients is subject to review.[15] Hospitals are prohibited from employing physicians.[16] Their ability to market is restrained.[17] Health maintenance organizations and other third party

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the position of local [district] hospitals." Appendix at 25a. The court below reversed this finding of the District Court as to the intent of the legislature. The two amendments the court relied on permit a district hospital to transfer assets to a private corporation and exempt from public disclosure records relating to contracts for alternative rates (Cal. Gov't Code § 6254(t)). Neither provision indicates that the legislature had not delegated authority from which anticompetitive conduct was foreseeable. On the contrary, the latter provision explicitly contemplates that the Hospital District would undertake the contracting activities claimed to have been conducted anticompetitively, see n.5, *supra*.

[14] *E.g.*, Cal. Health & Safety Code, Chapter 2, § 1250 *et seq.*; California Code of Regulations, Title 22, Division 5 (§ 70001-§ 79369), Division 7 (§ 94001-§ 97212). *See also, e.g.*, 42 U.S.C. § 1395cc; § 1395dd.

[15] 42 U.S.C. § 1395ww; 42 U.S.C. § 1320c-3.

[16] Cal. Bus. & Prof. Code § 2400.

[17] 42 U.S.C. § 1320a-7b(b).

payors are qualified and regulated by the state.[18] At the time of the events underlying the complaint, hospitals in California were subject to a regulatory structure requiring approval of the state's Office of Statewide Health Planning and Development before increasing bed capacity, building new facilities, or purchasing equipment which cost more than $1,000,000.[19] Because the court below expanded the scope of its inquiry to the competitive structure of the health care sector and then made its own characterization of the extent of competition in the health care sector, Petitioner did not have an opportunity to present these and other relevant facts about the nature of the health care sector.[20]

The theory developed by the court below also requires it to decide on the appropriate time period for determining the character of the sector of the economy at issue. The Local Hospital District Law was enacted in 1945; Petitioner was organized in 1953. Respondent argued that the state's policy toward the general health care sector changed in 1982. Did the legislature's intent with respect to authority conferred on hospital districts in 1945 change because of an alleged change in policy in 1982 with respect to the health care sector generally? Under the test adopted by the court below, it would be "foreseeable" from the 1945 statute that hospital districts would refuse to grant discounts without receiving commensurate benefits, but that this would not be foreseeable

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[18] Cal. Health & Safety Code, Chapter 2.2, § 1340 *et seq.*; Cal. Ins. Code, Chapter 11a, § 11491 *et seq.*

[19] Cal. Health & Safety Code § 437.10. The requirement was ended as of January 1, 1987. *Id.* at § 439.7.

[20] It is readily apparent that if the erroneous standard developed by the Court of Appeals is not corrected, lengthy and expensive litigation will be necessary to characterize the economic performance and industry structure of every sector of the economy in which political subdivisions operate.

from that same statute after 1982 because of a purported change of policy in the health care sector generally.[21]

This Court in *Town of Hallie* warned the courts against undertaking an exegesis of state legislation:

> Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny. (citation omitted)

Town of Hallie, 471 U.S. at 44, n.7.

The Court made this statement to discourage probing inquiry into a government agency's enabling legislation. The court below, however, went far beyond even the close examination of the District's enabling legislation that this Court had discouraged. It made its own characterization (without, in fact, a proper inquiry) of the legislature's intention toward competition in the health care field generally, on the basis of selected fragments of legislation affecting the general sector. The court embroiled itself far more intrusively into state legislation than the inquiry against which this Court had warned. In doing so, it introduced a standard that not only is unworkably ambiguous but also is irrelevant to and inconsistent with the rationale of the state action doctrine.[22]

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[21] As discussed in n.13, *supra*, the court cited only two changes in The Local Hospital District Law as support for the policy change. Neither suggests that the legislature's intent with respect to hospital districts' activities had changed since 1945. Rather, they represent the legislature's effort to give additional assistance to the districts to meet their financial difficulties. Ironically, one provision contemplated that hospital districts would negotiate contracts with third party payors, such as health maintenance organizations.

[22] The ambiguity created by a test that depends on the competitiveness of the sector in which the political subdivision is acting

The approach of the court below conflicts with that taken by other courts of appeals.[23] Those courts have found immunity for actions of a government agency which affected sectors that under the analysis of the court would be considered competitive, such as air transportation (*Interface; Montauk-Caribbean*); real estate and theater (*Cine 42nd Street; Unity Ventures*); taxicabs (*Independent Taxicab Drivers' Employees*); and—in precise conflict with the decision of the court below—physician and hospital services (*Coastal Neuro-Psychiatric*).[24] The courts, in fact, have found immunity for government agencies that are in direct competition with private firms, *Paragould Cablevision* (competition in cable television market) and *Allright Colorado* (competition in airport parking lots).

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and the uncertainty on how to ascertain it are reflected by a district court's ruling in another antitrust case brought against the Hospital District. In *Vazirani v. Antelope Valley Hospital District*, a doctor alleged that an exclusive contract which the Hospital District had entered into with another doctor violated the antitrust laws. The Hospital District moved for summary judgment contending that it was entitled to state action immunity under the test as enunciated in the decision below. To show the policy on exclusive contracts in the general health care sector, it pointed to approval by appellate courts in California of exclusive contracts for the provision of defined medical services. The District Court ruled that the decisions of the courts were insufficient to be an articulation of state policy because they were not decisions of the state Supreme Court and because the courts addressed the issue only in a judicial capacity, not in a legislative capacity, and consequently did not constitute "state action" for purposes of the defense. Order Re: Defendants' Motions for Summary Judgment, *Vazirani v. Antelope Valley Hospital District*, No. CV90-3262 WDK (C.D. Cal. Oct. 30, 1991).

[23] See n.9, *supra*.

[24] *See also* the District Court opinions in *Monarch Entertainment*, in which entertainment booking was affected, and *Cohn*, *Central Florida Clinic*, and *Hospital Development & Service Corp.*, involving hospital services.

B. The Court Erred in Limiting the State Action Defense to Regulatory Activity by the Government Agency

The court below also based its determination that the legislature had not intended to displace competition with regulation on the fact that the legislature had given hospital districts "no power to regulate the hospital services market, but has merely authorized them to provide hospital services along with regular competitors." Appendix at 11a. The court below thus limited immunity to political subdivisions which regulate the conduct of private actors and denied immunity for agencies which themselves provide services.

Neither the *Parker* doctrine itself nor its application to political subdivisions is limited to governmental entities when acting as regulators. The principles of sovereignty and federalism that inform the former and those of delegation that determine the latter are not based on any such distinction. Denial of the state action defense to an agency because it is conducting an activity violates the principles underlying the doctrine.

The decision of the court below is directly contrary to the decision of the Court in *Town of Hallie* and in *City of Lafayette*. The cities in those cases provided sewage services and electrical power, respectively, and did not regulate private persons. *Town of Hallie* explained that the word "regulates" in formulation of the immunity is synonymous with the government entity itself acting:

> [I]t is sufficient that the statutes authorized the City to *provide* sewage services and also to determine the areas to be served. We think it is clear that anti-competitive effects logically would result from this broad authority to *regulate*.

Town of Hallie, 471 U.S. at 42 (emphasis added).

The decision below also conflicts with those of numerous courts of appeals which have recognized the immunity for governmental subdivisions when they are engaged in

providing services to the public rather than regulating others.[25] The court cited no authority that suggests support for its holding that anticompetitive conduct is not foreseeable from authority to provide services, and there is none.

C. The Court Erred in Limiting the State Action Defense to Government Utilities and Other "Paradigmatic Natural Monopolies"

The court below stated that it was "more willing to find that a statute displaces competition with regulation if the statute concerns a utility," because utilities, as "paradigmatic examples of natural monopolies," are "usually intensively regulated." Appendix at 9a-10a and n.8, n.9.

This notion is inconsistent with the rationale of *Parker* and of the extension of that doctrine to political subdivisions. The application of *Parker* to political subdivisions of a state turns on whether they "should be deemed to be acting as agents of the State," *City of Lafayette*, 435 U.S. at 410-411, n.40, and their actions consequently reflect the will of the sovereign. This does not depend on whether the government agency is regulated as a utility. On the contrary, this Court's opinions established that the relevant regulator is the legislature, acting through the agency's enabling statute, and the voters. The city in *Town of Hallie*, provided sewage services, but was not subject to public utility regulation. The decision below also conflicts with the decisions of the courts of appeals cited above.[26] These cases applied

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[25] See n.9, *supra*. The immunity has been applied to governmental agencies which operated (i) hospitals (*Coastal Neuro-Psychiatric Associates*); (ii) airports (*Interface*; *Montauk-Caribbean Airways*; *Allright Colorado*; *Independent Taxicab Drivers' Employees*); (iii) airport parking lots and shuttle buses (*Allright Colorado*); (iv) a cable television system (*Paragould Cablevision*); (v) landfills (*Hancock Industries*); and (vi) a redevelopment agency in the real estate market (*Cine 42nd Street*).

[26] See n.9, *supra*.

the defense to political subdivisions that were involved in sectors that would not be considered to be natural monopolies; in none of these cases was the governmental entity regulated as a utility. The court's holding is without precedent.[27]

The rationale of the court below is inconsistent with *Parker*'s conclusion that states are not subject to federal antitrust requirements. To say that a political subdivision can avoid those requirements only if the state undertakes economic regulation of it effectively imposes a federal requirement of economic regulation on the sovereign states. It also is inconsistent with this Court's holding in *Town of Hallie* that delegation of state authority to a political subdivision need not be actively supervised to be free from federal antitrust challenge. *Town of Hallie*, 471 U.S. at 46-47.

Not only is the court's test of regulated utility or paradigmatic natural monopoly misdirected, but it is unworkable and fraught with the potential to spawn massively expensive federal litigation. There is controversy over which sectors of the economy should be viewed as "natural monopolies" and over what "mix" of regulation and competition will best serve the public interest even in heavily regulated industries.[28] This will vary not only by industry but by location.[29] To answer the question which

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[27] The court cited cases, Appendix at 9a-10a, which it characterized as involving a regulated utility. However, none of these cases made that factor a ground for decision. In none of the cases, in fact, was the government agency regulated by another entity.

[28] *See, e.g.*, H. Broadman, J. Kalt, *How Natural Is Monopoly? The Case of Bypass in Natural Gas Distribution Markets*, 6 Yale J. on Reg. 181 (1989); A.E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 Yale J. on Reg. 325 (1990).

[29] Many district hospitals are located in rural areas, and are the only hospital in their community. Would they be considered natural monopolies and meet this test for immunity, while district hospitals facing competition from another hospital would not? The defense

the court posed would require a full trial with conflicting economic testimony that would make even the factfinding on the merits in an antitrust merger case pale by comparison. More to the point, it would establish what is the legitimate scope of state economic action exercised through its political subdivisions on the basis of federal judges' predilections of whether competition is more appropriate than is regulation in a sector of the economy. Indeed, the dismissal by the court below of the *Town of Hallie* foreseeability test merely reflects its discomfort as a policy matter in allowing state agencies to act anticompetitively in areas of the economy that it believed are or could be competitive. But *Parker* held that it was just that freedom on the part of the states to act anticompetitively that Congress intended to preserve when it enacted the antitrust laws directed at private conduct.

III. THIS CASE PRESENTS IMPORTANT ISSUES ABOUT THE SCOPE OF THE STATE ACTION DEFENSE

The decision below is based on a misunderstanding of the governing law. It adds new excrescences to the state action doctrine which have no relevance to—and indeed contradict—its conceptual underpinning; conflicts with this Court's decisions and those of numerous other courts of appeals; and severely limits governmental subdivisions' immunity from antitrust suits.

The *Parker* doctrine is based upon principles of state sovereignty and federalism. These do not change because of the nature of the activity in which the state government is involved. The defense applies to political subdivisions of a state, as this Court has phrased the test, if the nature of the delegated authority is such that the actions of the political subdivision are deemed to repre-

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is not based on such extrinsic, and subjective, factors as those interjected by the court below.

sent state policy. The question is, "under what circumstances a State's subdivisions engaging in anticompetitive activities should be deemed to be acting as agents of the State." *City of Lafayette*, 435 U.S. at 410-411, n.40. This question is not informed by considering whether the governmental entity is acting as a regulated utility, whether it is providing a service, or whether the sector of the economy in which it is operating is competitive. The question is answered by the relationship of the conduct to the nature of the authority delegated by the state. As this Court has held, the issue is whether the state has delegated specific authority to act in an area, in the exercise of which it is foreseeable that the conduct claimed to be anticompetitive might be taken.

The erroneous decision will have significant and adverse effects on political subdivisions of states within the Ninth Circuit and on the administration of justice within that Circuit. It will enmesh federal courts in an analysis of the extent to which numerous sectors of the economy are intended to be competitive and whether a particular activity is that of a utility or other paradigmatic natural monopoly. It will "embroil the federal courts in the unnecessary interpretation of state statutes," to a far greater extent than that against which this Court warned in *Town of Hallie*, 471 U.S. at 44, n.7.

Under the decision, a broad range of governmental agencies in the Ninth Circuit will be at risk of antitrust attack, even when they in good faith exercise their authority and take actions authorized by state law. Their counterparts in other circuits, on the other hand, will be immune. Under the decision, a political subdivision that operates a bus system, port or airport, sports stadium, civic arena, or a hospital is no longer covered by the *Parker* defense. Similarly, the decision denies immunity to governmental entities that provide housing, radio or television broadcasting, or schools. In each of these activities, the government agency is not acting as a regu-

lated utility, is providing a service itself rather than regulating private conduct, and is engaged in what a court is likely to find is a competitive sector of the economy.

The decision will have a significant and adverse effect on government entities in the Ninth Circuit. It will chill legitimate governmental actions, require government agencies to expend money in defense of antitrust suits, and subject to review by federal antitrust courts governmental actions taken pursuant to state statute.

CONCLUSION

Review by the Court is necessary to correct the errors perpetrated by the court below, to resolve a conflict among the courts of appeals, to avoid expensive and intrusive litigation in the federal courts, and to correct a holding that impairs state sovereignty and the operation of government. The Court should grant this Petition for Certiorari and issue the writ.

Respectfully submitted,

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December 13, 1991

APPENDIX

APPENDIX

[OPINION BELOW]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-55167

D.C. No.
CV-87-0722-WMB

LANCASTER COMMUNITY HOSPITAL,
Plaintiff-Appellant,

v.

ANTELOPE VALLEY HOSPITAL DISTRICT,
Defendant-Appellee.

No. 89-55347

LANCASTER COMMUNITY HOSPITAL,
Plaintiff-counter-defendant-Appellant,

v.

ANTELOPE VALLEY MEDICAL GROUP, INC.,
Defendant-Appellee,

and

ANTELOPE VALLEY HOSPITAL DISTRICT,
Defendant-counter-claim-3rd party-plaintiff-Appellee.

ORDER AND OPINION

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding

Argued and Submitted
May 9, 1990—Pasadena, California

Filed January 18, 1991
Withdrawn July 15, 1991
Filed July 15, 1991

Before: Procter Hug, Jr., Cynthia Holcomb Hall and Stephen S. Trott, Circuit Judges.

Opinion by Judge Hall

COUNSEL

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ORDER

The opinion filed January 18, 1991, is hereby withdrawn and the attached opinion shall be filed in its stead.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

HALL, Circuit Judge:

Lancaster Community Hospital ("Lancaster") appeals two district court orders. In the first order, the district court granted defendants' motions for summary judgment on Lancaster's federal antitrust claims. In the second order the district court did the same with respect to Lancaster's claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*

I

Plaintiff-appellant Lancaster brought a federal antitrust action [1] against Antelope Valley Hospital ("Antelope"), Antelope Valley Hospital District ("District"),[2]

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[1] The complaint also contained state-law antitrust claims as well as state tort claims. Although the court granted Antelope's motion for summary judgment on these claims, Lancaster's appeal only concerns the federal antitrust claims.

[2] Antelope is owned and operated by the District. The District is a not-for-profit hospital district organized under California's Local Hospital District Law, Cal. Health & Safety Code § 32000. Although the district court's initial grant of summary judgment was directed

and Antelope Valley Medical Group ("Group"). Lancaster alleged that the defendants sought to use Antelope's monopoly in perinatal services to increase the hospital's market share in non-perinatal services. Antelope, it is said, would not allow certain health maintenance organizations ("HMOs") to contract for perinatal services unless the HMOs agreed to use Antelope for non-perinatal services as well. The district court granted both Antelope's and the District's motions for summary judgment,[3] based on the state action immunity doctrine and the Local Government Antitrust Act of 1984, 15 U.S.C. § 35.

Lancaster then reformulated its complaint to allege RICO claims against the District and Group pursuant to 18 U.S.C. § 1962 (b)—(c). The complaint accused defendants of conducting the affairs of Antelope through a pattern of fraudulent schemes, including misappropriation of public funds, violations of federal and state anti-kickback statutes, and violations of state laws prohibiting the making of false entries in the records of a corporation. Lancaster further alleged that defendants furthered these purportedly fraudulent schemes by use of the United States mails. The district court granted defendants' motion to dismiss Lancaster's RICO claims finding, *inter alia*, that Antelope and District, as gov-

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in favor of Antelope, the court in a later order specified that "[i]n its previous order, the Court found that the District was clothed with immunity from plaintiff's antitrust claims under the state action doctrine." (ER at 146) None of the parties on appeal contends that a meaningful distinction between Antelope and the District can be made for purposes of state action immunity.

[3] The district court refused to grant the Group's motion for summary judgment, concluding that since the Group is a private entity the test announced in *Patrick v. Burget*, 486 U.S. 94 (1988), would have to apply for the Group to qualify for state action immunity. The court was unprepared to state at the time of the motion whether the Group would qualify for such immunity. This ruling is not before us on appeal.

ernment entities, could not be held liable under RICO, and that Lancaster had failed to establish the predicate act of mail fraud.

II

The district court had jurisdiction over this action under 28 U.S.C. § 1331 (federal question jurisdiction) and *id.* § 1337 (commerce and antitrust regulations). *See also* 15 U.S.C. §§ 15, 26. Additionally, the district court had jurisdiction over the civil RICO claim pursuant to 18 U.S.C. § 1964. This court has jurisdiction under 28 U.S.C. § 1291, since the district court converted its summary judgment orders to final judgments pursuant to Fed. R. Civ. P. 54(b).

"We review a grant of summary judgment de novo. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986)." *United States v. CMA, Inc.*, 890 F.2d 1070, 1072 (9th Cir. 1989).

III

The first question we must decide is whether defendants Antelope and District are beyond the reach of the antitrust laws by operation of state-action immunity. This question turns on whether the California state legislature has displaced competition with regulation in the provision of hospital services.[4] We conclude that defend-

[4] We often say that this issue requires a two-step analysis: First, whether the activity complained of is authorized; second, whether the state intends to displace completion with regulation. *See, e.g., Traweek v. San Francisco*, 920 F.2d 589, 591—92 (9th Cir. 1990); *Boone v. Redevelopment Agency*, 841 F.2d 886, 890 (9th Cir.), *cert. denied* 488 U.S. 965 (1988). In this case there is no question but that defendants were authorized to enter into contracts. We thus

ants are not exempt from the antitrust laws, and we accordingly reverse the district court's grant of summary judgment in favor of defendants on the antitrust claim.[5]

It is clear that a state itself, whether acting through its legislative, judicial, or executive departments, is not subject to the antitrust laws. *See Parker v. Brown*, 317 U.S. 341, 350—52 (1943); *Charley's Taxi Radio Dispatch v. SIDA of Hawaii*, 810 F.2d 869 (9th Cir. 1987). However, when a state delegates authority to a subordinate entity that then acts anti-competitively, the subordinate is not automatically beyond the reach of antitrust. *See Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (municipality); *Grason Electric Co. v. Sacramento Municipal Utility District*, 770 F.2d 833, 836—38 (9th Cir. 1985) (local electrical utility district), *cert. denied*, 474 U.S. 1103 (1986). The courts must assure themselves that the subordinate acts in accord with the state's wishes when it contravenes the federal antitrust laws. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

In *Town of Hallie* the Supreme Court addressed at length the question whether a municipality had established state action immunity. The City of Eau Claire, which had the only sewage treatment facilities in the vicinity, refused to supply sewage treatment services to adjoining towns unless they agreed to use its sewage transportation and collection services as well. Further, the city would supply landowners in the area with sewage treatment services only if they agreed to be annexed. The Supreme Court held that the city was not

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turn to the question whether the state has displaced competition with regulation.

[5] Since we find that Antelope and District are not authorized to act anticompetitively, we need not go on to decide whether Lancaster's competitors have such influence over Antelope and District that active state supervision is required to validate their anticompetitive conduct under *Patrick v. Burget*, 486 U.S. 94 (1988).

subject to the antitrust laws, but fell within the state action exemption. *Town of Hallie*, 471 U.S. at 41-44.

The Court held that for the city to be exempt it had to show that it acted pursuant to a "clearly articulated" state policy to displace competition with regulation. *Id.* However, the city was not required to point to a specific, detailed legislative authorization for either its specific action or for anticompetitive conduct in general in order to show this "clearly articulated" state policy. *Id.* at 42. Rather, a showing that the city had general authority to provide sewer services and fix the limits of service in unincorporated areas was sufficient. Since the city's anticompetitive actions were the "foreseeable and logical result" of its power to refuse to serve unannexed areas, the city acted in accord with state policy and was immune to antitrust challenge. *Id.* at 41-42, 44; *see also Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1350 (1991).

Defendants Antelope and District argue that, under *Town of Hallie*, their broad authority to provide hospital services in and of itself establishes authority to exclude others from providing hospital services. Further, defendants contend that we may not, in deciding whether the state's policy is to support competition or supplant it, consider the general state policies towards competition in the hospital service sector of the economy. In defendants' view we can do no more than lay the language of their authorization alongside the language of the authorization provided the City of Eau Claire in *Town of Hallie*. If the language of defendants' grant is as broad as Eau Claire's, we are to find the defendants are exempt from the antitrust laws.

Town of Hallie does not support defendants' mechanistic position. Under *Town of Hallie* the courts are to focus on whether the state's policy is to supplant or support competition in the area of dispute, albeit paying

particular attention to the foreseeable or logical consequences of a state's grant to a delegate of broad authority. *Town of Hallie* does not require that we invariably conclude, regardless of the circumstances, that a broad mandate to act gives authority to prevent others from acting. The *Town of Hallie* Court itself considered extraneous Wisconsin statutes on the subject of municipal sewer systems, as well as Wisconsin state court decisions, in evaluating Wisconsin's policy towards competition. 471 U.S. at 42 n.5, 44 n.8.[6]

In addition to *Town of Hallie*, defendants cite to a number of Ninth Circuit cases. However, a close reading of these cases shows that none of them lend defendants compelling support.

First, a number of defendants' cases are of limited value because they simply involve the straightforward application of *Town of Hallie* in circumstances quite unlike those now presented. To recite the facts of these cases is to distinguish them from the instant case. For example, in *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755, 757 (9th Cir. 1986), the court held that the logical result of a county's power to create an Emergency Medical Service with only a few authorized ambulance services is that other ambulance services will be excluded. *See also Traweek*, 920 F.2d at 593 (it is a logical and foreseeable result of city's zoning authority that some builders are excluded);[7] *Boone*

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[6] The entire thrust of *Town of Hallie* is to caution against parsing state statutes in an attempt to find a specific authorization for a particular activity, since "[n]o legislature can be expected to catalog all of the anticipated effects of a statute. . . ." 471 U.S. at 43. It is in this light that the Court's caution against too close an "examination of a state legislature's intent" must be read. *Id.* at 44. Clearly the Court did not mean to foreclose such examination as is necessary to understand the state's delegation in light of the state's general policy.

[7] Contrary to Antelope's contentions, *Traweek* is wholly consistent with our approach in the instant case. The *Traweek* court con-

v. Redevelopment Agency of San Jose, 841 F.2d 886, 890 (9th Cir.), *cert. denied* 488 U.S. 965 (1988) (redevelopment agency with power to zone, rezone, and grant exceptions from building regulations); *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985) (directors of state agency authorized to set rates).

A second set of defendants' cases is of limited value because the cases cited involve utilities of one sort or another. *See Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514, 520 (9th Cir. 1987) (water works), *cert. denied*, 486 U.S. 1015 (1988); *Grason Electric Co. v. Sacramento Municipal Utility District*, 770 F.2d 833, 836-38 (9th Cir. 1985) (local electrical utility district), *cert. denied*, 474 U.S. 1103 (1986); *Preferred Communication, Inc. v. Los Angeles*, 754 F.2d 1396 (9th Cir. 1985) (cable television), *aff'd on other grounds*, 476 U.S. 488 (1986). We indicated in *Preferred Communication* that because utilities place a burden on public resources—for example, they often string high voltage wires about—they are usually intensively regulated. 754 F.2d at 1414-15.[8] Since utilities are usu-

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sidered the statutes that were relevant to the case before it, and concluded that the state had displaced competition with regulation. *Traweek*, 920 F.2d at 593. Although we too focus on the question of whether the state's policy is to suppress or support competition, we deal with different statutes here.

[8] Perhaps a better explanation of why electric utilities, water works, and cable television are generally highly regulated is that these industries are paradigmatic examples of natural monopolies.

> The unifying characteristic of natural monopoly industries is the ability of a single firm to provide the most economical service to a given area. Within the area reached by the physical facilities of the firm, the introduction of additional suppliers requires a wasteful duplication of plant and a significant increase in cost not normally justified by any benefits to users of the service. Under such circumstances, monopoly is accepted

ally regulated we have been more willing to find that a statute displaces competition with regulation if the statute concerns a utility. *Compare Grason Electric Co.*, 770 F.2d at 836-38 (finding anticompetitive conduct a foreseeable result of the creation of a utility) *with Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187, 1189 (9th Cir. 1988) (the creation of a single dispatcher for a region did not indicate a policy to eliminate competition in the normally competitive air ambulance business).[9]

Finally, defendants cite a number of cases in which a general power to regulate cannot be seriously contested. These cases turn on the question whether the *misuse* of a clearly granted regulatory power causes state-action immunity to lapse.[10] Interesting as this

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as the most appropriate industry structure and the industry is subjected to regulation as a "public utility."

Jones, Government Price Controls and Inflation: A Prognosis Based on the Impact of Controls in the Regulated Industries, 65 Cornell L. Rev. 303, 304 (1980). *See generally*, M. Handler, H. Blake, R. Pitofsky & H. Goldschmid, Cases and Materials on Trade Regulation App. B (2d ed. 1983).

[9] This ground for distinguishing the instant case from these other cases in no way contradicts *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). In *Garcia* the Supreme Court repudiated the unworkable distinction between "integral" and "proprietary" government functions in the context of state sovereign immunity analysis. In the instant case we do not attempt to revive this discredited approach for use in the field of state-action immunity. Rather, we explain the different approaches that this court has taken when attempting to divine a state's view towards competition. This court, in considering whether a state has intended to displace competition with regulation, seems to have considered whether competition is generally thought to be a viable alternative to regulation in the relevant sphere of economic activity. In cases involving paradigmatic natural monopolies, we have more readily found that the legislature has intended to displace competition with regulation.

[10] The answer is a resounding "no." *See Traweek*, 920 F.2d at 592—93 (city does not lose antitrust exemption because it exercised

question may be, the issue in the instant case is whether competition has been supplanted by regulation in the first place, and these cases are therefore inapposite.

Applying the standards set forth in *Town of Hallie* and its Ninth Circuit progeny, we conclude that the state of California has not displaced competition with regulation in the provision of hospital services, and that defendants are therefore not shielded by state-action immunity. No single factor in isolation brings us to this conclusion. Rather, we focus on two points.

First, the state has given the defendants no power to regulate the hospital services market, but has merely authorized them to provide hospital services along with regular competitors.[11] This in itself does not seem to

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zoning authority maliciously); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 890 (9th Cir.), *cert. denied* 488 U.S. 965 (1988) (redevelopment agency with power to zone, rezone, and grant exceptions from building regulations does not lose antitrust immunity because it may have exercised its regulatory power corruptly); *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985) (directors of state agency authorized to set rates do not lose state-action exemption if they act corruptly).

[11] Local hospital districts have been granted the powers needed to engage in the hospital business by the state of California. A hospital district's board of directors

> shall be responsible for the operation of all hospitals owned or leased by the district, according to the best interests of the public health and shall make and enforce all rules, regulations and bylaws necessary for the administration, government, protection and maintenance of hospitals under [its] management and all property belonging thereto and may prescribe the terms upon which patients may be admitted thereto.

Cal. Health & Safety Code § 32125. Among other powers, local hospital districts can:

> • establish, maintain and operate one or more health facilities at any location for the benefit of the district and the people served by the district (§ 32121(j));

indicate that the state has displaced competition with regulation in the provision of hospital services. Since defendants are not associated with a paradigmatic example of a natural monopoly, *cf. Grason Electric Co.*, 770 F.2d at 836-38 (discussed supra), a mere statutory authorization to engage in business will not be so readily viewed as a displacement of competition. *See Medic Air Corp.*, 843 F.2d at 1189.

More importantly, we have before us numerous concrete legislative actions that indicate California, instead of making regulation the order of the day in the hospital

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- establish rates, and do so in a way which "will permit the hospital to be operated upon a self-supporting basis" (§ 32125) (emphasis added);
- "finance experiments with new methods of providing adequate health care" (§ 32126.5(c));
- "enter into contacts with health care provider groups . . . and independent physicians and surgeons for the provision of health services" (§ 32126.5 (a)) (emphasis added);
- operate or provide assistance to "health care services provider groups and organizations . . . necessary for the maintenance of good physical . . .
- health in the communities served by the district" (§ 32121 (b));
- enter into joint ventures for the benefit of the district (§ 32121(o));
- "exercise the right of eminent domain for the purposes of acquiring real or personal property of every kind necessary to the exercise of any of the powers of the district" (§ 32121(d));
- borrow and incur indebtedness (§ 32130);
- issue bonds (§ 32216)
- contract with health care providers and physicians as long as this "does not result in any profits or gain to the district from the services so rendered" (§ 32129) (emphasis added);
- "do any and all other acts and things necessary to carry out this division" (§ 32121(k));
- exercise all powers "necessarily implied" (§ 32121(k)).

service sector of the economy, has committed itself to a competitive market.[12] It thus appears that the state's policy is to enhance competition rather than to replace it. *See Town of Hallie*, 471 U.S. at 42 n.5 (considering state statutes in concluding that competition had been replaced by regulation); *Grason Electric Co.*, 770 F.2d at 838 (basing its conclusion that competition had been displaced in part on the defeat in the state legislature of numerous attempts to deregulate). In short, the foreseeable result of the statutory scheme before us is that hospital districts such as Antelope will compete, not that they will preclude competition by others. *Cf. Columbia*, 111 S. Ct. at 1350 (foreseeable result of zoning authority that competition will be displaced).

This court has previously held that when the circumstances indicate that a state's general policy is to displace competition with regulation, a subordinate state entity need show no more than an authorization to "do business" to qualify for the state action exemption. *See*

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[12] California has passed a number of amendments to the local hospital district law over the years, and these amendments contemplate that the districts operate in a competitive environment. These amendments 1) allow hospital districts to transfer assets to private nonprofit corporations (§ 32121 (p) (West Supp. 1989)) and 2) exempt from disclosure to the public "records of a local hospital district . . . which relate to any contract with an insurer or nonprofit hospital service plan for inpatient or outpatient services or alternative rates" for one year after execution of the contract. Cal. Gov't Code § 6254(t) (West Supp. 1987).

Moreover, California has affirmatively acted to deregulate hospital and other health care services. These provisions 1) permit public and private third party payors to contract for inpatient hospital services (Cal. Welf. & Inst. Code § 14081); 2) do away with older legislation requiring health care providers to obtain certificates of need to construct or add to health care facilities (Cal. Health & Safety Code § 439.7 (West Supp. 1989); and 3) permit "California purchasers, providers, and payors to form efficient-sized bargaining units for the purpose of contracting for the delivery of health care services." (Cal. Bus. & Prof. Code § 10133.6 (West Supp. 1989)).

Grason Electric Co., 770 F.2d at 836-38; note 4, *supra*. For in such a case "suppression of competition is the foreseeable result" of the statutory scheme. *Columbia*, 111 S. Ct. at 1350. We now hold that when there are abundant indications that a state's policy is to support competition, a subordinate state entity must do more than merely produce an authorization to "do business" to show that the state's policy is to displace competition.[13] The defendants did not act in accord with California policy when they engaged in anticompetitive conduct, and the state-action exemption is as a consequence unavailable to them. We therefore reverse the order of summary judgment in favor of defendants on Lancaster's antitrust claim.[14]

IV

We next consider the district court's order of summary judgment in favor of defendants on Lancaster's RICO

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[13] A third type of case may arise. A state's general policy may be to promote competition, but the state might nevertheless authorize a particular anticompetitive activity. We are not faced with such a case at present. Nevertheless, we speak of it to emphasize the narrowness of our holding. Since the question in all cases under *Town of Hallie* turns on the state's policy, it seems clear that a particular authorization to act in an anticompetitive manner makes the state action exemption applicable. Further, it should not ordinarily take a great many such specific authorizations to show that the state's policy is to displace competition with regulation.

[14] We note that there is no support for defendants' assertion that Lancaster cannot be awarded attorney's fees if Lancaster's antitrust action for injunctive relief is successful. Defendants cite in support of their position the Local Government Antitrust Act of 1984 ("LGAA"), 15 U.S.C. §§ 34—36. The LGAA precludes the recovery of damages, costs, or attorneys fees, on the basis of 15 U.S.C. §§ 15, 15a, or 15c, from local government entities. 15 U.S.C. § 35(a). However, the provision that mandates that costs and attorneys fees be awarded to plaintiffs who "substantially prevail" in an actions for injunctive relief is 15 U.S.C. § 26. Section 35(a), by its clear terms, has no effect on § 26. *See also Palm Springs Medical Clinic, Inc. v. Desert Hospital*, 628 F. Supp. 454 (C.D. Cal. 1986).

claim. We conclude that summary judgment was appropriately granted.

The RICO claims against Antelope and District fail because government entities are incapable of forming a malicious intent. *Biondolillo v. Sunrise*, 736 F. Supp. 258, 260-61 (S.D. Fla. 1990); *North Star Contracting Corp. v. Long Island R.R. Co.*, 723 F. Supp. 902, 907-908 (E.D.N.Y. 1989); *In re Citisource, Inc. Securities Litigation*, 694 F. Supp. 1069, 1080-81 (S.D.N.Y. 1988); *Massey v. Oklahoma City*, 643 F. Supp. 81 (W.D. Okl. 1986); *see also Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 261 (1981) (noting the existence of respectable authority" that municipal corporations "cannot, as such, do a criminal act or a willful and malicious wrong . . . ."). A specific intent to deceive is an element of the predicate act, mail fraud, on which Lancaster's RICO claim is based. 18 U.S.C. § 1341; *Sun Sav. and Loan Assoc. v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987).

The wisdom of this rule is evident in light of the circumstances of the instant case. The "body politic," that is, the taxpayers, will pay if Lancaster's RICO claim is successful. Yet the "body politic" was the target of the deception perpetrated. Thus, the "body politic" was not even aware of any dishonest activities, and plainly lacked the specific intent to deceive which is an element of mail fraud.

Moreover, Lancaster cannot impose liability on the "body politic" by appeals to the doctrine of *respondeat superior* or to principles of agency. For public policy is offended if all the citizens of a state are made liable for extraordinary damages as a result of the actions of a few dishonest officials. In *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, the Court held that punitive damages are not available in § 1983 actions, rejecting claims that the city should be responsible for the reprehensible conduct of her agents. The Court distinguished municipal corporations from the ordinary variety:

> [T]he relation which the officers of a municipal corporation sustain toward the citizens thereof for whom they act, is not in all respects identical with that existing between the stockholders of a private corporation and their agents; and there is not the same reason for holding municipal corporations, engaged in the performance of acts for the public benefit, liable for the willful or malicious acts of its officers, as there is in the case of private corporations.

Fact Concerts, 453 U.S. at 261-62 (*quoting Hunt v. City of Boonville*, 65 Mo. 620, 624, 625 (1877)). Exemplary damages are not available against municipal corporations, "because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer [i]s being chastised." 453 U.S. at 263. Since civil RICO damages are not merely compensatory, but are trebled, 18 U.S.C. § 1964(c), *Newport* is compelling. As such, Lancaster cannot establish that Antelope or District committed mail fraud, and its RICO claim against them falls.

Lancaster's RICO claim against Group is more plausible, but we agree with the district court that Lancaster has not produced facts sufficient to support it. The problem is again Lancaster's inability to establish the predicate act of mail fraud.

Federal Rule of Civil Procedure 9(b) requires a pleader of fraud to detail with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme. Fed. R. Civ. P. 9(b). The Ninth Circuit has repeatedly insisted that this rule be followed in RICO actions alleging the predicate act of mail fraud. *See Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989) (failure to specify the time, place, and content of the alleged mail fraud); *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 196 (9th Cir. 1987) (fraud pleaded with sufficient

particularity when four instances in which the scheme was furthered by use of the mails are specifically alleged); *Schreiber Dist. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

Lancaster has failed to specify the facts relating to the alleged use of the mails. Lancaster does contend that the application that Group filed with the California Secretary of State in order to have its status changed from for-profit to not-for-profit was sent by mail on or about July 27, 1987. However, at least two predicate acts are required in order to establish a "pattern" for RICO purposes, 18 U.S.C. § 1961(5), and Lancaster has failed to show a second mailing. Although Lancaster claims that in July or August of 1987 Group delivered to District a letter in which Group fraudulently suggested that it would repay District for its assistance, this claim is demolished by an uncontroverted declaration that the letter was hand delivered, not sent through the mails.

Lancaster's other contentions regarding the use of the mails are too generalized to satisfy the dictates of Rule 9(b). For instance, Lancaster claims that District, as part of a scheme in which Group participated, used the mails to submit claims for reimbursement to state and federal health care financing agencies for services rendered to patients referred to Antelope pursuant to illegal kickback schemes. However, no specific mailings are mentioned; instead, the applicable time period "from 1986 up through the present" is listed. This is insufficient. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989).

Of more concern than Lancaster's failure to adequately support the alleged use of the mails is Lancaster's failure to adequately support its allegations of fraud. Lancaster claims that defendants engaged in "misappropriation of public funds, violations of federal and state anti-kickback statutes, and violations of state law prohibiting the

making of false entries in the records of a corporation." However, none of the actions allegedly taken by defendants constitute fraud.

In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court ruled that the mail fraud statute only protects *property rights*, not the intangible right of the citizenry to good government.[15] The facts of *McNally* are similar to those of the instant case. A government official was said to have awarded a valuable contract to one insurance company on the condition that a second company in which he had an ownership interest receive a share of the commissions earned by the first. This "kickback scheme" did not fall within the mail fraud statute. 483 U.S. at 360-61.[16] *See also United States v. Lew*, 875 F.2d 219 (9th Cir. 1989) (property must be obtained from the person who is deceived); *First Pac. Bancorp, Inc. v. Bro.* 847 F.2d 542, 547 (9th Cir. 1988) ("[U]se of the mail with false or fraudulent pretenses for the specific purpose of causing pecuniary loss must be alleged.") (citations omitted).

Lancaster simply cannot establish that defendants sought to deprive it of property. Consider Lancaster's

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[15] *McNally* has now been superseded by statute. *See* 18 U.S.C.A. § 1346 (1990). However *McNally* continues to provide the rule of decision for conduct that occurred prior to the statute's enactment on November 18, 1988. See *United States v. Soriano*, 880 F.2d 192 (9th Cir. 1989); *United States v. Kato*, 878 F.2d 267 (9th Cir. 1989). Congress, of course, cannot criminalize conduct that has already occurred, U.S. Const., Art. I § 9 cl. 3, and mail fraud is a criminal offense.

[16] Subsequently, in *Carpenter v. United States*, 484 U.S. 19 (1987) the Supreme Court held that § 1341 encompasses intangible property rights. *Carpenter* involved the Wall Street Journal's right to the exclusive pre-publication use of its "heard on the street" columns. The Court noted that newsmatter "'is stock in trade . . . to be distributed and sold to those who will pay money for it, as for any other merchandise.'" 484 U.S. at 18 (quoting *International News Service v. Associated Press*, 248 U.S. 215, 236 (1918).

claim that defendants violated federal and state anti-kickback statutes. This claim is grounded on the allegation that assets were transferred to Group with the understanding that Group would refer all of its patients to Antelope. This alleged referral activity was not designed to deprive Lancaster of either tangible or intangible property. It was part of an attempt to increase Antelope's market share at the expense of its competitor's. Similarly, allegations that false entries were made in corporate records also cannot establish mail fraud under *McNally*. Again, these false entries were not part of an attempt to deprive another of property, but were part of an attempt to increase Antelope's market share. The same is true for all of Lancaster's claims.

"Market share" is neither tangible or intangible property; its loss is far too amorphous a blow to support a claim of mail fraud under the reasoning of *McNally*, 483 U.S. at 356-60, and *Carpenter*, 484 U.S. at 26 (news-matter a commodity traded like any other). Put differently, it might be said that defendants hoped to "steal" Lancaster's customers. But it cannot be said that these customers were Lancaster's property.

The "fraud" Lancaster alleges is in reality nothing more or less than unalloyed anticompetitive conduct. This conduct may be unacceptable, but it is not "fraud." We accordingly affirm the order of summary judgment in favor of defendants on Lancaster's RICO claim.

AFFIRMED in part, REVERSED in part, and REMANDED.

[ORDER OF DISTRICT COURT]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 87-722-WMB

LANCASTER COMMUNITY HOSPITAL,
Plaintiff,
v.

ANTELOPE VALLEY HOSPITAL MEDICAL CENTER, *et al.*,
Defendants.

ORDER GRANTING DEFENDANT
ANTELOPE VALLEY HOSPITAL'S
MOTION FOR SUMMARY JUDGMENT

[Filed Mar. 2, 1988]

I. INTRODUCTION

Antelope Valley Hospital (AV) is a medical facility located in Lancaster, California and owned and operated by the Antelope Valley Hospital District. Antelope Valley Hospital District was established in 1953 under the California local Hospital District Law. Lancaster Community Hospital (Lancaster) is also a health care provider in competition with AV. Lancaster filed this complaint alleging state and federal antitrust violations and certain state law tort claims.

Lancaster alleges that AV used its position as the only health care provider in the relevant geographic area to

offer perinatal services to pressure large insurance carriers such as Maxicare and Blue Cross to send to AV patients requiring inpatient medical/surgical services. Allegedly, AV accomplished this by threating to make it difficult for the customers of a particular carrier to obtain perinatal services at AV unless that carrier also sent AV a certain portion of its inpatient medical/surgical business.

Lancaster alleges that these and other actions constituted violations of both state and federal antitrust laws. Moreover, Lancaster alleges that in taking the actions it did, AV interfered with its contractual relationships and its prospective economic advantage.

AV moves for summary judgment claiming that it is immune from federal antitrust liability pursuant to the common law state action exemption and under the Antitrust Act of 1984. Moreover, AV contends that it is not liable for state antitrust violations because political subdivisions are immune from such actions. Finally, AV argues that it is immune from state tort claims due to common law immunity doctrines and because Lancaster failed to provide the required statutory notice of its claim.

II. DISCUSSION

A. *Federal Antitrust Claims*

1. *State Action Immunity*

The Supreme Court most recently discussed state action immunity in *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985). In that case, the Court squarely faced an issue substantially identical to the one before this Court: whether a municipality's anticompetitive activities are protected by the state action exemption to federal antitrust laws when the anticompetitive activities are authorized, but not compelled, by the state. In *Hallie*, the state of Wisconsin delegated to the City of Eau Claire the authority to construct, alter and repair sewage sys-

tems as well as the power to describe, with reasonable particularity, the area to be served.

Determining that the municipality was entitled to the state action exemption from liability under federal antitrust laws, the Court stated:

> [I]n proving that a state policy to displace competition exists, the municipality need not "be able to point to a specific, detailed legislative authorization" in order to assert a successful [state action] defense to an antitrust suit. Rather, . . . it would be sufficient . . . for a municipality to show that it acted pursuant to a "clearly articulated and affirmatively expressed . . . state policy. . . ."

Id. at 1716-17 (citations omitted). The Court held that pursuant to the powers delegated to the City, the state had clearly atriculated a policy to replace competition with regulation in the area of sewer service. *Id.* at 1720. Accordingly, the municipality was immune from damage suits for federal antitrust violations.

The Ninth Circuit has on numerous occasions determined whether a state grant of authority to a municipality was such that it constituted a clearly articulated policy to replace competition with regulation. In *Grason Elec. Co. v. Sacramento Mun. Utility Dist.*, 770 F.2d 833 (9th Cir. 1985), the court held that a municipality which employed anticompetitive techniques, in connection with its administration of a public utility, qualified for state action immunity. The state statute in *Grason* authorized the Sacramento Municipal Utility District to "acquire, construct, own, operate, control or use . . . works for supplying the inhabitants of the district . . . with light [and] power . . . and may do all things necessary or convenient to the full exercise of the powers herein granted." *Id.* at 837. Interpreting the statute, the court found this grant of authority to constitute a clearly articulated state policy to displace competition with regulation.

Therefore, the state action exemption immunized the utility district from federal antitrust liability.

The Ninth Circuit has construed the state action exception very liberally. In *Springs Ambulance Service v. City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984), the court interpreted the following language to contain a clearly articulated purpose of replacing competition with regulation: "The legislative body of a city may contract for ambulance service to serve the residents of the city as convenience requires." *Id.* at 1273. The court determined that the anticompetitive acts complained of were "surely within the contemplation of the legislature" when it enacted the code section quoted above. *Id.*

In a recent Ninth Circuit opinion, *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), the court adopted language from the *Hallie* decision in stating that "[s]o long as the [anticompetitive activity] is a 'foreseeable result' which results logically from a broad grant of regulatory authority to a city, the 'clear articulation' requirement is satisfied". *Id.* at 518-19 (quoting *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1718 (1985)).

The authority granted by the state to the AV hospital district is at least as broad as that passed upon in the cases discussed above. The powers delegated to hospital districts include: (1) the power to "establish, maintain and operate one or more health facilities within or without the district for the benefit of the district; (2) to exercise the right of eminent domain; (3) to do any and all other acts and things necessary to carry out this division. *See Cal. Health & Safety Code* §§ 32121 (West Supp. 1987). While the district is empowered with other authority, the powers listed above appear to satisfy the Ninth Circuit test for "a clearly articulated policy to replace competition with regulation." *See also Coastal Neuro-Psychiatric Assoc. v. Onslow Memorial Hosp.*, 795 F.2d 340 (4th Cir. 1986) (holding hospital immune from antitrust liability under state action exemption).

Before AV can be protected by state action immunity, this Court must decide whether a hospital district qualifies as a municipality eligible for immunity. While there appears to be no Ninth Circuit authority, the Court concludes that the hospital district does qualify as a municipality for purposes of state action immunity. Faced with facts very similar to those present in this case, a district court in Florida held that a hospital district was immunized by means of the state action doctrine. *Hospital Dev. & Serv. Co. v. North Broward Hosp. Dist.*, 619 F. Supp. 535, 538 (S.D. Fla. 1985); *see also Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 13 (1st Cir 1987) (listing factors similar to the factors present in this case as making an entity eligible for protection under the state action doctrine). Moreover, in one piece of legislative history, the districts are referred to as political subdivisions of the state. *See* Exhibit A at 35 attached to memorandum in support of motion.

Lancaster raises three points to counter AV's analysis. First, Lancaster asserts that California has clearly articulated a policy of promoting competition among health care providers and therefore could not be said to sanction the anticompetitive activities attributed to AV. Second, plaintiff argues that the Ninth Circuit authorities discussed above are not controlling because they involve authorizing statutes other than the California Local Hospital District Law. Finally, plaintiff argues that those cases involved municipal functions traditionally reserved to the state or local governments, unlike the operation of a hospital.

In an effort to establish that California maintains a policy to promote competition among health care providers, plaintiff points to three recent amendments to the California Local Hospital District Law. These amendments (1) allow hospital districts to transfer assets; (2) allow closed door meetings of hospital district boards of directors; and (3) provide a trade secret exemption for

district hospitals. Plaintiff claims that these changes in the law were designed to protect the ability of local hospitals to compete with private health care providers.

Plaintiff's contentions are not well taken. Although in enacting these amendments the legislature recognized that competition existed among health care providers, this is not persuasive evidence that the California legislature did not intend or could not foresee that hospital districts would engage in anticompetitive activities. Moreover, these amendments appear to have been an effort to strengthen the position of district hospitals rather than to announce a policy favoring competition over regulation.

These recent amendments were discussed by a California court in *Yoffie v. Marin Hosp. Dist.*, 193 Cal. App. 3d 743, 238 Cal. Rptr. 502 (Cal. Ct. App. 1987). There, the court recognized that the express goal of the amendments was "to enable local hospital districts to remain competitive with non public hospitals." *Id.* at 509. However, the Court did not construe these revisions as signaling a policy in favor of competition. More likely, the legislature determined that where competition did exist, even more authority was required to buttress the position of local hospitals.

More importantly, in *Hallie*, the Supreme Court cautioned trial judges not to engage in searching analysis of legislative history. *Hallie*, 105 S. Ct. at 1719 & n.7. Rather, the Court instructed that judges should seek only to determine whether the challenged anticompetitive conduct was contemplated by the legislature when it enacted the statute at issue. *Id.* Here, the broad grant of authority clearly indicates that the complained of anticompetitive acts were within the contemplation of the legislature.

Plaintiff's allegation that the Ninth Circuit authority cited does not concern district law is not compelling. Courts constantly analogize to cases similar, but not identical, to the case before them. The authority cited above is substantially similar to the present case and the Court finds it persuasive.

Finally, plaintiff argues that state action immunity is only available in situations where the state is performing a function traditionally reserved to the state. In areas traditionally of a proprietary nature, plaintiff argues that the doctrine should not apply. Plaintiff cites no Ninth Circuit authority to support this proposition. He relies on two points: (1) that the authority defendant cites concerns functions traditionally performed by the state; (2) an excerpt from Professor Areeda's treatise on antitrust law supporting such a dichotomy. With respect to the Ninth Circuit, plaintiff cites no authority specifically recognizing the dichotomy he wishes this Court to adopt. Moreover, Professor Areeda noted that the majority of the Supreme Court has rejected this dichotomy. Additionally, most courts have essentially ignored any distinction between proprietary and traditional functions of the state. *Wall v. City of Athens*, 663 F. Supp. 747, 761 (M.D. Ga. 1987); P. Areeda & H Hovenkamp, *Antitrust Law*, at 93-94 (Supp. 1986); *see also Garcia v. San Antonio Metro. Transit Auth*, 105 S. Ct. 1005 (1985) (rejecting distinctions between traditional and integral governmental functions when determining state immunity from federal regulation under the Commerce Clause).

From the broad grant of authority delegated to the hospital districts, the Court finds that AV is immune from liability under the state action exception to federal antitrust laws.

2. *Antitrust Act of 1984*

The Antitrust Act provides that "[n]o damages, interest on damages, costs, or attorney's fees may be recovered under [federal antitrust law] from any local government. . . ." 15 U.S.C. § 35 (Supp. 1987). In *Palm Springs Medical Clinic, Inc v Desert Hosp.*, 628 F. 454, 456-64 (C.D. Cal. 1986), the district court exhaustively analyzed the legislative history surrounding the Act. Concluding that a hospital district was immune from antitrust lia-

bility under the Act, the court dismissed the federal antitrust claims against a district hospital. *Id.* at 464

Plaintiff argues that the Antitrust Act should not apply to AV because it has failed to comply with its enabling legislation by engaging in profit making activities. Plaintiff cites a number of cases it contends support the proposition that a party must establish strict adherence to its enabling legislation to secure the benefits of any exemption associated with that legislation. Plaintiff's cases do not support that proposition that a party must establish strict adherence to its enabling legislation to secure the benefits of any exemption associated with that legislation. Plaintiff's cases do not support that proposition and its contention is not well taken.

Plaintiff initially cites *Wall v. City of Athens*, 663 F. Supp. 747, 760 (M.D. Ga. 1987). In *Wall*, what the court held was that the municipality's conduct was not foreseeable from the state's grant of authority. It did not hold that because the municipality violated its enabling legislation, it lost its antitrust immunity. Plaintiff's other citations are equally unpersuasive. In those opinions, courts applied antitrust laws to certain activities which fell outside the parameter of exempted conduct. *See Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966); *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960); *Board of Trade v. ICC*, 646 F.2d 1187 (7th Cir. 1981). These cases do not involve situations where an entity allegedly violated its enabling legislation.

Moreover, plaintiff's argument was explicitly rejected in *Palm Springs*, 628 F. Supp. at 459 n.4. As that court observed, the Antitrust Act was designed to protect localities from an increasing number of lawsuits which interfered with their ability to effectively govern. Allowing plaintiffs to sidestep the antitrust exemption by finding violations of enabling legislation would inhibit a municipality in the performance of its function and would de-

feat the purpose of the Act. Plaintiff's argument is unsupported by case authority and inconsistent with the goal of the Antitrust Act.

For the above reasons, the Court finds that AV is insulated from antitrust liability under the Antitrust Act of 1984.[1]

B. *State Antitrust Claims*

AV argues that it is immune from liability under the Cartwright Act[2] pointing to a number of cases which held that political subdivisions are so immune. *Blank v. Kirwan*, 39 Cal. 3d 31, 322-23, 216 Cal. Rptr. 718, 725, 703 P.2d 58 (Cal. S. Ct. 1985). Defendant, however, correctly notes that no California case has addressed the issue whether a hospital district qualifies as a political subdivision for purposes of the Cartwright Act.

AV cites cases in which courts have, in other contexts, treated hospital districts as political subdivisions or government entities. For example, in *Heath v. Redbud Hospital District*, 436 F. Supp. 766, 768 (N.D. Cal. 1977), the court determined that for purposes of civil rights claims brought under 42 U.S.C. § 1983 hospital districts were organized under state statutes and therefore were subdivisions of a state. Other cases have found local hospital districts to be "public entities" for purposes of statutes restricting an individual's ability to sue such

---

[1] Although the Court need not reach the issue, it believes there are serious questions as to whether AV actually violated its enabling legislation.

[2] The Cartwright Act, found at California Business and Professions Code Sections 16600, prohibits restraints on trade and anticompetitive conduct generally. Although the California Supreme Court initially determined that the Cartwright Act did not apply to the medical profession, the court reversed itself in a later opinion. *See Cianci v. Superior Court*, 40 Cal. 3d 903, 916-25, 221 Cal. Rptr. 575, 582-87, 710 P.2d 375 (1985), *overruling Willis v. Santa Ana Hosp. Assoc.*, 58 Cal. 2d 806, 26 Cal. Rptr. 640, 376 P.2d 568 (1962).

entities. *Lutz v. Tri-City Hosp.*, 179 Cal. App. 3d 807, 224 Cal. Rptr. 787 (Cal. Ct. App. 1986); *see also Cal. Health & Safety Code* § 32492 (West 1973).

Also, there are several opinions which hold that "the Sherman Act and the Cartwright Act are similar and that Sherman Act cases apply in construing the Cartwright Act." *Derish v. San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347, 1350 (9th Cir. 1983), *disapproved on other grounds, Marrese v. American Academy of Orthopaedic Surgeons*, 105 S. Ct. 1327 (1985); *Palm Springs*, 628 F. Supp. at 466; *Rosack v. Volvo of Am. Corp.*, 131 Cal. App. 3d 741, 751, 182 Cal. Rptr. 800 (Cal. Ct. App. 1982). As the Court has concluded above, district hospitals are eligible for immunity from federal antitrust liability under more than one theory. The Court considers this persuasive in deciding whether hospital districts are eligible for immunity for state antitrust violations.

The Court believes that when faced with the issue, California courts interpreting the Cartwright Act will hold that local hospital districts qualify as political subdivisions for purposes of immunity from state antitrust claims. Accordingly, the Court grants AV's motion for summary judgment with respect to plaintiff's Cartwright Act claim.

C. *State Tort Claims*

AV contends it is immune from tort liability under the California Tort Claims Act. *Cal. Gov't Code* §§ *815, 815.2, 820.2* (West 1980). Plaintiff argues that immunity under the Act accrues only if the acts complained of are discretionary acts. While this may be true for vicarious liability under sections 815.2 and 820.2 of the Government Code, it is not the rule where, as with the present case, plaintiff alleges direct liability. Additionally, the actions complained of here are more properly characterized as "planning" rather than "operational" and

should therefore be considered discretionary. *H & M Assoc. v. City of El Centro*, 109 Cal. App. 3d 399, 406-07, 167 Cal. Rptr. 392, 397 (Cal. Ct. App. 1980).

Finally, Lancaster failed to provide the required 100 day notice of its claim. *Cal. Gov't Code* § 911.2 (West 1980). Failure to comply with this statute bars the claim. *Lutz v. Tri-City Hosp.*, 179 Cal. App. 3d 807, 224 Cal. Rptr. 787 (Cal. Ct. App. 1986). Plaintiff offers three reasons why the Court should ignore the notice requirements: (1) AV had actual notice of the tort claims; (2) AV hospital did not raise the 100 day requirement in its Answer; (3) AV hospital has rejected a settlement offer from plaintiff. However, plaintiff offers no authority which allows a Court to set aside the 100 day limit let alone setting it aside for the reasons stated above.

Accordingly, the Court grants defendant's summary judgment motion with respect to plaintiff's state law tort claims.

III. CONCLUSION

Defendant's motion for summary judgment is granted in its entirety.

DATED: March 2, 1988

/s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-55167

D.C. No. CV-87-0722-WMB

LANCASTER COMMUNITY HOSPITAL,
Plaintiff-Appellant,

v.

ANTELOPE VALLEY HOSPITAL DISTRICT,
Defendant-Appellee.

No. 89-55347

LANCASTER COMMUNITY HOSPITAL,
Plaintiff-counter-defendant-Appellant,

v.

ANTELOPE VALLEY MEDICAL GROUP, INC.,
Defendant-Appellee

and

ANTELOPE VALLEY HOSPITAL DISTRICT,
Defendant-counter-claim-3rd party-plaintiff-Appellee.

ORDER

[Filed Sep. 16, 1991]

Before: HUG, HALL and TROTT, Circuit Judges.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

[EXCERPTS FROM LOCAL HOSPITAL DISTRICT LAW
Cal. Health & Safety Code §§ 32000 et seq. as of January 1, 1989]

§ 32000. Citation of division

This division shall be known and may be cited as "The Local Hospital District Law."

§ 32001. Organization, incorporation and management: Exercise of powers: Territory: Inclusion or annexation of previously excluded territory

A local hospital district may be organized, incorporated and managed, as provided in this division and may exercise the powers herein granted or necessarily implied. Such a district may include incorporated or unincorporated territory, or both, or territory in any one or more counties. The territory comprising this district need not be contiguous but the territory of a municipal corporation shall not be divided; provided, that land either in a municipal corporation or in unincorporated territory which the supervising authority finds will not be benefited shall not be included.

* * * *

§ 32101. Who are qualified electors

All registered voters residing within the territory comprising a district organized under this division are qualified electors.

* * * *

§ 32104. Powers of board

The board of directors shall provide for the time and place of holding its regular meetings and the manner of calling the same, and shall establish rules for its proceedings and may adopt such rules and regulations not inconsistent with law as may be necessary for the exercise of the powers conferred and the performance of the duties imposed upon the board.

* * * *

§ 32121. Powers of district generally

Each local hospital district shall have and exercise the following powers:

(a) To have and use a corporate seal and alter it at its pleasure.

(b) To sue and be sued in all courts and places and in all actions and proceedings whatever.

(c) To purchase, receive, have, take, hold, lease, use, and enjoy property of every kind and description within and without the limits of the district, and to control, dispose of, convey, and encumber the same and create a leasehold interest in the same for the benefit of the district.

(d) To exercise the right of eminent domain for the purpose of acquiring real or personal property of every kind necessary to the exercise of any of the powers of the district.

(e) To establish one or more trusts for the benefit of the district, to administer any trust declared or created for the benefit of the district, to designate one or more trustees for trusts created by the district, to receive by gift, devise, or bequest, and hold in trust or otherwise, property, including corporate securities of all kinds, situated in this state or elsewhere, and where not otherwise provided, dispose of the same for the benefit of the district.

(f) To employ legal counsel to advise the board of directors in all matters pertaining to the business of the district, to perform the functions in respect to the legal affairs of the district as the board may direct, and to call upon the district attorney of the county in which the greater part of the land in the district is situated for legal advice and assistance in all matters concerning the district, except that if that county has a county counsel, the directors may call upon the county counsel for legal advice and assistance.

(g) To employ any officers and employees, including architects and consultants, the board of directors deems necessary to carry on properly the business of the district.

(h) To prescribe the duties and powers of the hospital administrator, secretary, and other officers and employees of any hospitals of the district, to establish offices as may be appropriate and to appoint board members or employees to those offices, and to determine the number of, and appoint, all officers and employees and to fix their compensation. The officers and employees shall hold their offices or positions at the pleasure of the boards of directors.

(i) To do any and all things which an individual might do which are necessary for, and to the advantage of, a hospital and a nurses' training school.

(j) To establish, maintain and operate one or more health facilities or health services, including, but not limited to, outpatient programs, services and facilities, retirement programs, services and facilities, chemical dependency programs, services and facilities, or other health care programs, services and facilities and activities at any location within or without the district for the benefit of the district and the people served by the district.

"Health facilities," as used in this subdivision, means those facilities defined in either Section 15432 of the Government Code or Section 1250 of this code and specifically includes free standing chemical dependency recovery units.

(k) To do any and all other acts and things necessary to carry out this division.

(l) To acquire, maintain, and operate ambulances or ambulance services within and without the district.

(m) To establish, maintain, and operate, or provide assistance in the operation of, free clinics, diagnostic and testing centers, health education programs, wellness and

prevention programs, rehabilitation, aftercare, and any other health care services provider groups and organizations which are necessary for the maintenance of good physical and mental health in the communities served by the district.

(n) To establish and operate in cooperation with its medical staff a coinsurance plan between the hospital district and the members of its attending medical staff.

(o) To establish, maintain, and carry on its activities through one or more corporations, joint ventures, or partnerships for the benefit of the hospital district.

(p)(1) To transfer with or without consideration, any part of its assets to one or more nonprofit corporations to operate and maintain the assets for the benefit of the communities served by the district. The initial members of the board of directors of the nonprofit corporation or corporations shall be approved by the board of directors of the hospital district and shall be residents of the district. This subdivision does not invalidate or affect any transfers made prior to March 1, 1985, pursuant to this subdivision.

(2) Nothing in this section, including subdivision (j), shall be construed to permit a local hospital district to obtain or be issued a single consolidated license to operate a separate physical plant as a skilled nursing facility or an intermediate care facility which is not located within the boundaries of the hospital district.

(q) To contract for bond insurance, letters of credit, remarketing services, and other forms of credit enhancement and liquidity support for its bonds, notes, and other indebtedness and to enter into reimbursement agreements, monitoring agreements, remarketing agreements, and similar ancillary contracts in connection therewith.

(r) To impose special taxes pursuant to Article 3.8 (commencing with Section 53730.01) of Chapter 4 of Part 1 of Division 2 of Title 5 of the Government Code.

* * * *

§ 32125. Operation of hospitals owned or leased by district: Rules, regulations and by-laws: Rates: Minimum standards of operation

The board of directors shall be responsible for the operation of all hospitals owned or leased by the district, according to the best interests of the public health and shall make and enforce all rules, regulations and by-laws necessary for the administration, government, protection and maintenance of hospitals under their management and all property belonging thereto and may prescribe the terms upon which patients may be admitted thereto. However, such hospitals shall not contract to care for indigent county patients at below the cost for care. In setting the rates the board shall, insofar as possible, establish such rates as will permit the hospital to be operated upon a self-supporting basis. The board may establish different rates for residents of the district than for persons who do not reside within the district. Minimum standards of operation as prescribed in this article shall be established and enforced by the board of directors.

* * * *

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 91-953

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ANTELOPE VALLEY HOSPITAL DISTRICT,
Petitioner,

v.

LANCASTER COMMUNITY HOSPITAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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---

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Antelope Valley Hospital District ("Petitioner") seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in this case on July 15, 1991. *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991). The Ninth Circuit's decision reversed an order of the United States District Court for the Central District of California granting summary judgment in favor of Petitioner on antitrust claims asserted by Lancaster Community Hospital ("Respondent" or "Lancaster").

Respondent's original complaint alleged that Petitioner and Respondent compete in providing hospital services in the area designated by the California Office of Statewide Health Planning and Development as Health Facilities Planning Area ("HFPA") 991. The gravamen of Lan-

caster's complaint was that Antelope Valley Hospital Medical Center ("AV Hospital"), which is owned and operated by Petitioner, has sought to exploit its monopoly over perinatal services to increase its market share in non-perinatal hospital services. Specifically, Lancaster alleged that AV Hospital exploited its monopoly power over perinatal services by requiring health maintenance organizations ("HMOs") to have all or a portion of their enrollees use AV Hospital's non-perinatal services as a condition precedent to entering into a contract with AV Hospital.

California HMOs are required by law to contract with each hospital where their enrollees are regularly admitted. Lancaster alleged that HMOs wishing to operate in HFPA 901 needed to contract with AV Hospital because AV Hospital was the only hospital in the relevant geographic market which offered perinatal services—services which, for all practical purposes, must be made available by HMOs to their enrollees. Accordingly, HMOs in the relevant market had no practical alternative but to use AV Hospital for enrollees requiring perinatal services. Lancaster alleged that by refusing to contract with HMOs unless they agreed to send all or a substantial portion of their non-perinatal enrollees to AV Hospital, Petitioner sought to restrict competition on the merits in the market for non-perinatal inpatient medical/surgical services.

AV Hospital moved for summary judgment solely on the basis of state action immunity without contesting Lancaster's factual allegations.[1] Accordingly, the anti-

[1] Petitioner disingenuously suggests that "[b]ecause the case came to the Court of Appeals on summary judgment, [it] had not had an opportunity to demonstrate the reasons it took the actions of which Respondent had complained." Pet. at 13 n.8. It was, of course, Petitioner which elected to limit its motion for summary judgment on Lancaster's antitrust claims to the state action issue. Petitioner's eleventh hour effort to place before this Court a self-serving rendition of "facts" allegedly supporting other defenses is highly improper. Such assertions were not part of the record before

competitive purpose and effect of AV Hospital's conduct must be presumed for purposes of this petition. In reversing the District Court's order granting summary judgment, the Ninth Circuit Court of Appeals found that the anticompetitive conduct forming the basis of Lancaster's complaint was not shielded by the state action doctrine.

In seeking discretionary review of the Court of Appeal's decision, Petitioner has misapplied decisions of this Court and has attempted to contrive a conflict among the circuits that does not exist. For the reasons set forth below, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S CONCLUSION THAT PETITIONER'S CONDUCT WAS NOT EXEMPT FROM THE ANTITRUST LAWS RESULTS FROM PROPER ANALYSIS OF THE STATE ACTION DOCTRINE

Petitioner strains to characterize the Ninth Circuit's decision as inconsistent with this Court's state action cases. In doing so, Petitioner misconstrues and disregards fundamental elements of the state action doctrine.

The threshold issue in state action analysis is not simply whether the complained of conduct was authorized. To trigger the state action doctrine, the party seeking to invoke the defense must demonstrate that the authorization is pursuant to a " 'clearly articulated and affirmatively expressed . . . state policy' " to " 'displace competition with regulation or monopoly public service.' " *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 413 (1978), *quoted in, Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985).

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either the District Court or the Court of Appeals and would, in any event, be vigorously contested by Lancaster. Accordingly, the purported proffer set forth in footnote 8 of the Petition should be disregarded by this Court.

Petitioner's contention that "[t]he decision of the court below disregards the standard enunciated by the Court in *City of Lafayette* and *Town of Hallie*," Pet. at 11, is simply wrong. After examining a variety of Wisconsin statutes "in some detail," *Town of Hallie*, 471 U.S. at 40-41, this Court concluded in *Town of Hallie* that the "statutes evidence a 'clearly articulated and affirmatively expressed' state policy to displace competition with regulation in the area of municipal provision of sewage services." *Id.* at 44. Nothing in *Town of Hallie*, however, suggests that the Court substituted mere authorization for the requisite state policy to displace competition. Rather, the Court inferred from the fact that the State of Wisconsin delegated to the City the authority to construct and maintain sewage treatment facilities—which expressly included the discretion to serve whomever the City pleased—that the state had contemplated that anticompetitive effects would result. In short, authorization is a necessary, but not—standing alone—sufficient component of the state action doctrine. What must also be shown is that the state intends to displace competition. *See* Ninth Circuit Decision at App. 5a n.4.

Unfortunately, Petitioner persists in attempting to truncate the proper inquiry by arguing that it is foreseeable from the mere "grant of authority to act in an area that [a] governmental entity will take anticompetitive actions related to that activity." Pet. at 14. Authorization, however, is simply the first step in the analysis. As *Town of Hallie* requires, and as the Ninth Circuit plainly recognized, the ultimate focus goes beyond the relatively straightforward question of authorization to the second critical question: "whether the state's policy is to supplant or support competition in the area of dispute, albeit paying particular attention to the foreseeable or logical consequences of a state's grant to a delegate of broad authority." Ninth Circuit Decision at App. 7a-8a.

While it is not necessary for a local governmental entity seeking state action immunity to point to an explicit

statement by the legislature that it "intends for the delegated action to have anticompetitive effects," *Town of Hallie*, 471 U.S. at 43, it is also not enough to point simply to legislative authority to act where, as here, the legislature has plainly adopted a policy to promote—not displace—competition.

Nonetheless, Petitioner argues that its "broad authority to provide hospital services in and of itself establishes authority to exclude others from providing hospital services." Ninth Circuit Decision at App. 7a.[2] In effect, Petitioner asks this Court to ignore direct evidence of California's policy regarding competition among hospitals, limit the analysis to the threshold issue of authorization to act, and rely on indirect evidence as to the state's policy which, Petitioner contends, is to be inferred from AV Hospital's enabling legislation. "In [AV Hospital's] view we can do no more than lay the language of their authorization alongside the language of the authorization provided the City of Eau Claire in *Town of Hallie*. If the language of [AV Hospital's] grant is as broad as Eau Claire's, we are to find the defendants are exempt from the antitrust laws." *Id.*

The Ninth Circuit quite properly declined Petitioner's invitation to depart from the principles of state action analysis established by this Court. In so doing, the Court of Appeals correctly observed that *Town of Hallie* itself "does not support defendants' mechanistic position." Ninth Circuit Decision at App. 7a. Petitioner's approach,

[2] In a footnote, Petitioner appears to challenge the Court of Appeals' characterization of its position quoted above by denying that Petitioner was accused of excluding others from providing hospital services. Pet. at 8 n.6. This contention is puzzling in light of the allegations of the Complaint in this action, which include, *inter alia*, monopolization and attempted monopolization of the relevant hospital services market, along with tying and exclusive dealing. The Complaint also alleges that AV Hospital acted with monopolistic intent. The purpose and effect of such monopolistic conduct is, of course, inherently exclusionary.

which would end the analysis upon a showing of authorization to act—without giving direct consideration to the state's policy regarding competition in the area of dispute, cannot be squared with *Town of Hallie*. Even in *Town of Hallie*, as the Court of Appeals noted, the Supreme Court did not confine itself to legislation authorizing the City of Eau Claire to construct sewer systems in determining the presence or absence of a policy to displace competition.[3] Ninth Circuit Decision at App. 8a.

In sum, AV Hospital plainly has been authorized by the California legislature to do what is necessary to provide hospital services. Based on that authority, Petitioner urges this Court, as it did those below, to assess that authorization in a vacuum and not trouble itself with the ultimate issue: "whether the state's policy is to supplant or support competition in the area of dispute." *Id.* at App. 7a. Such truncated state action analysis cannot be reconciled with *Town of Hallie*.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS

In its effort to characterize the Ninth Circuit's decision as conflicting with decisions of other circuits, Petitioner relies principally on two cases: *Paragould Cablevision*,

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[3] In addition to the Wisconsin statute authorizing cities to construct, add to, alter and repair sewage systems, Wis. Stat. § 62.18(1) (1982), the Supreme Court also considered state legislation governing city operated public utilities generally, as well as a statute authorizing Wisconsin's Department of Natural Resources to regulate city sewer operations. *Town of Hallie*, 471 U.S. at 41, 42 n.5. The *Town of Hallie* Court also considered a decision rendered by the Wisconsin Supreme Court in a similar case brought by the Town of Hallie under Wisconsin's state antitrust laws. While noting that the Wisconsin Court's antitrust opinion does not, of course, determine the city's immunity under the federal antitrust laws, the Supreme Court found the Wisconsin opinion "instructive on the question of the state legislature's intent in enacting the statutes relating to the municipal provision of sewage services." *Id.* at 44-45 n.8.

Inc. v. City of Paragould, 930 F.2d 1310 (8th Cir.), *cert. denied*, 112 S. Ct. 430 (1991) and *Allright Colorado, Inc. v. City of Denver*, 937 F.2d 1502 (10th Cir.), *cert. denied*, 60 U.S.L.W. 3404 (U.S. Dec. 3, 1991) (No. 91-572). Neither of these cases reach results that are inconsistent with the Ninth Circuit's analysis.

In *Paragould Cablevision*, the parties did not dispute that the City of Paragould was authorized by the State of Arkansas to enter the cable television business. Such authorization necessarily provided the city-owned cable television system with a competitive advantage by virtue of its access to the existing governmental infrastructure including, *inter alia*, rent-free office space, trucks and equipment, computerized demographic information, rights of way and utility poles. *City of Paragould*, 930 F.2d at 1314.

The Eighth Circuit held that a sufficient state policy to displace competition had been demonstrated because the challenged restraint was a necessary and reasonable consequence of the city's statutorily authorized entry into the cable television business. In reaching this conclusion, the Court found:

> If the Arkansas legislature did not intend the utilization of these resources and the resultant benefit of being able to supply cable services with diminished overhead costs, it would have tailored the enabling statutes accordingly. Because of the nature and extent of municipal operations, the displacement of competition necessarily results *whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies.*

Id. (emphasis added).

In short, the Eighth Circuit's conclusion that the city's conduct was undertaken pursuant to a state policy to displace competition was linked explicitly to the Court's recognition that the state had authorized the city to enter

an industry with monopolistic tendencies. This aspect of the *City of Paragould* opinion is significant in the context of this case for at least two reasons. First, nothing in the record before the Ninth Circuit would support a finding that the hospital industry in California has "monopolistic tendencies." This, alone, serves to distinguish the instant case from *City of Paragould*, where the monopolistic tendency of the industry entered by the municipality contributed significantly to the Court's conclusion that state action doctrine was properly invoked.

Second, the Eighth Circuit's reference to the monopolistic tendency of the industry before it is entirely consistent with the Ninth Circuit's discussion of other cases —e.g., those involving utilities and natural monopolies— where it has upheld state action defenses. Ninth Circuit Decision at App. 9a-10a. In these circumstances, Petitioner's argument that the Ninth Circuit's reference to industry structure is both unprecedented and inconsistent with the law of other circuits, does not withstand even cursory examination.

Moreover, the Eighth Circuit's reference in *City of Paragould* to what the Arkansas legislature could have done had it sought to evidence a different intent regarding competition is also instructive. As recognized by the Ninth Circuit in this case, California has passed a number of amendments to the local hospital district law which contemplate that the district hospitals "operate in a competitive environment." Ninth Circuit Decision at App. 13a n.12. *See also Yoffie v. Marin Hospital District*, 193 Cal. App. 3d 743, 238 Cal. Rptr. 502 (1987). Equally significant is the fact that the California legislature has elsewhere demonstrated its ability to create explicit antitrust exemptions where it intends to do so.

In *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755 (9th Cir. 1986), for example, the Ninth Circuit noted that the California legislature had

amended the state's Emergency Medical Services Act as follows:

> It is the intent of the Legislature in enacting this section . . . to prescribe and exercise the degree of state direction and supervision over emergency medical services as will provide for state action immunity under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed functions under this division.

Mercy-Peninsula Ambulance, 791 F. Supp. at 758 n.2 (quoting Cal. Health & Safety Code § 1797.6(b) (West Supp. 1986)). Had the California legislature sought to exempt district hospitals from the federal antitrust laws, it would presumably have done so in the manner demonstrated above for emergency medical services, or as when it sought to confer such an exemption on "the formation of groups and combinations of purchasers, payers, and institutional and professional providers of health care services for the purpose of creating efficient-sized contracting units." Cal. Ins. Code § 10133.6 (West Supp. 1991).

Allright Colorado, a recent Tenth Circuit case to which Petitioner seems to attribute much significance, likewise fails to reflect a conflict between the circuits. First, the analytic approach employed by the Tenth Circuit is indistinguishable from that employed by the Ninth Circuit in this case. The Tenth Circuit, quoting *Town of Hallie* and *City of Lafayette*, began its state action discussion as follows:

> Municipalities are shielded from antitrust liability for allegedly anticompetitive acts "authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" This court follows a two-part test for evaluating municipal state action immunity. "First, the state legislature must have authorized the action under challenge. Second, the legislature must have intended to displace competition with regulation."

Allright Colorado, 937 F.2d at 1506 (citations omitted). The Tenth Circuit's formulation is essentially identical to that articulated here by the Ninth Circuit:

> We often say that this issue requires a two-step analysis: First, whether the activity complained of is authorized; second, whether the state intends to displace competition with regulation. *See, e.g., Traweek v. San Francisco*, 920 F.2d 589, 591-92 (9th Cir. 1990); *Boone v. Redevelopment Agency*, 841 F.2d 886, 890 (9th Cir.), *cert. denied*, 488 U.S. 965 (1988). In this case there is no question but that defendants were authorized to enter into contracts. We thus turn to the question whether the state has displaced competition with regulation.

Ninth Circuit Decision at App. 5a-6a n.4. Moreover, while noting that the two parts of the municipal immunity analysis "will not always have equal prominence," the Tenth Circuit, like the Ninth Circuit here, emphasized that "[t]he two parts of the inquiry are designed to answer the central question—whether there is a "clearly articulated and affirmatively expressed policy' to displace competition." *Allright Colorado*, 937 F.2d at 1507 n.8 (citation omitted).

To apply this standard, the *Allright Colorado* court then examined the relevant statutes to determine whether they authorized the actions challenged and whether they evidenced the requisite state policy to displace competition in the provision of off-airport shuttle bus parking. *Id.* at 1508. Review of the applicable statutes readily revealed that the municipal entity operating the Denver airport was explicitly granted a broad authority to regulate the removal and embarkation of passengers to and from the airport. In short, there could be no serious dispute that the state had authorized the City and County of Denver to regulate the operations of off-airport parking shuttle bus providers, including those providers offering such services in competition with the defendants. *Id.* at 1508-09. Accordingly, the City was not subject to anti-

trust liability, notwithstanding the fact that it was also in some sense a competitor of the plaintiff. *Id.* at 1510.

In the present case, Lancaster is likewise a competitor of AV Hospital, but unlike the City and County of Denver, Petitioner has been granted no authority by the State of California to regulate the conduct of other hospitals. It is entirely appropriate, therefore, that the Ninth and Tenth Circuits would, after applying the same legal standard to vastly different statutory schemes, reach different conclusions as to the applicability of the state action doctrine. Far from constituting a conflict between the circuits, the cases reflect an entirely harmonious approach to the analysis to be under state action doctrine.[4]

III. THE NINTH CIRCUIT HAS NEITHER CREATED NEW TESTS NOR JEOPARDIZED THE PRINCIPLES OF FEDERALISM UNDERLYING THE STATE ACTION DOCTRINE

Petitioner's argument that the Ninth Circuit has "interposed three new tests," Pet. at 16, into state action analysis is baffling and, in any event, incorrect. Petitioner attempts to convert the Court of Appeals' description and categorization of a number of its prior cases into new tests, but the premise underlying this argument is flawed. Nowhere in its decision does the Ninth Circuit limit the availability of the state action defense in the manner hypothesized by Petitioner. The test remains straightforward and, as shown above, entirely consistent with *Town of Hallie*. A local governmental entity seeking to

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[4] The other case referenced in the text of the Petition in support of the purported conflict among the circuits is also readily distinguishable from the instant case. Nowhere in *Coastal Neuro-Psychiatric Associates, P.A. v. Onslow Memorial Hospital, Inc.*, 795 F.2d 340 (4th Cir. 1986) is there any suggestion that the State of North Carolina had, like California, taken "numerous concrete legislative actions . . . to enhance competition rather than to replace it" in the provision of hospital services. Ninth Circuit Decision at App. 12a-13a (citation and footnote omitted).

invoke the state action doctrine bears the burden of demonstrating that its anticompetitive conduct was authorized pursuant to a state policy to displace competition. Where, as here, the state has clearly articulated a policy to promote competition among hospitals, general authorization to do business as a hospital simply does not warrant an exemption from the federal antitrust laws. To reach a different conclusion in these circumstances would do violence to the state's specific, unambiguous, procompetitive policy and thus contradict the very principles of federalism which undergird the state action doctrine.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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